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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 33

RECONSTRUCTION FINANCE CORPORATION,

PETITIONER

v.

WESTERN PACIFIC RAILROAD CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The initial report and order of the Interstate Commerce Commission (R. 194) [1] are reported in 230 I. C. C. 61; its report and order on further consideration (R. 300) are reported in 233 I. C. C. 409; and its order denying the further petition of the Debtor, The Western Pacific Railroad Company, for modification of the plan approved by it (R. 884) is reported in 236 I. C. C. 1. The opinion of the District Court

[1] The full record in this case consists of the transcripts of the proceedings before the Interstate Commerce Commission, the District Court and the Court below, together with numerous exhibits, all of which have been certified and filed with this Court. In view of the voluminous character of the record, the parties have stipulated (R. 2625) for the printing of only selected portions thereof. Those portions have been consolidated into nine volumes, designated herein as "R".

(R. 1569) is reported in 34 F. Supp. 493. The opinion of the Circuit Court of Appeals (R. 2663) is reported in 124 F. (2d) 136.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 28, 1941 (R. 2675-2676). Petitions for rehearing were filed by Irving Trust Company, an indenture trustee, and by the Debtor, whose appeals had been dismissed by the decree of November 28, 1941. On February 12, 1942, a rehearing was granted. On February 16, 1942, an order was entered setting aside so much of the decree of November 28, 1941, as had dismissed the appeals of the Irving Trust Company and of the Debtor, but denying all further relief sought by the petitions for rehearing (R. 2681). The petition for a writ of certiorari was filed February 28, 1942, and was granted [2] on April 27, 1942. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Sections 24(c) and 77 of the Bankruptcy Act.

QUESTIONS PRESENTED

On July 29, 1939 the Interstate Commerce Commission, in proceedings under Section 77 of the Bank-

[2] The other respondents below, Frederick H. Ecker, John W. Stedman, and Reeve Schley, constituting the Institutional First Mortgage Bondholders Committee; and Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage of the Western Pacific Railroad Company, each filed petitions for writs of certiorari and the Western Pacific Railroad Company filed a cross petition. These petitions and the cross petition were also granted.

ruptcy Act, issued an order approving a plan of reorganization (R. 362-400) for the Western Pacific Railroad Company, Debtor. The principal questions are:

1. Whether the findings and conclusions of the Interstate Commerce Commission were sufficient to support the exclusion of the stockholders and unsecured creditors of the Debtor from participation, as provided in the plan.

2. Whether the findings and conclusions of the Interstate Commerce Commission were sufficient to support the allocation of the securities of the reorganized company among those found to be entitled to share therein, in the manner provided in the plan.

3. Whether, as the Circuit Court of Appeals indicated in its opinion, the District Court misconceived the respective functions of the Interstate Commerce Commission and the District Court in connection with plans of reorganization under Section 77 of the Bankruptcy Act.

STATUTE INVOLVED

The relevant portions of Section 77 of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C. §205, as amended, are set forth in Appendix A, *infra*, pp. 92 to 105.

STATEMENT

This case arises out of reorganization proceedings instituted over seven years ago. On August 2, 1935 the Western Pacific Railroad Company (hereinafter called the Debtor) filed its petition (R. 4) for reorganization under Section 77 of the Bankruptcy Act (hereinafter called Section 77) with the District

Court for the Northern District of California, Southern Division, and a copy thereof with the Interstate Commerce Commission (hereinafter called the Commission. Over four years later, after extended proceedings, the Commission, on September 28, 1939, certified to the District Court (R. 1034) a plan (R. 362) for the reorganization of the Debtor. The plan excluded the stockholders and unsecured creditors of the Debtor from participation, their equity and claims having been found to have "no value" (R. 269) and allocated new securities to the creditors found to be entitled thereto. The District Court, after hearing, approved the Commission's plan by its order of August 15, 1940 (R. 1569). Because the Commission had not made certain findings considered essential by the Circuit Court of Appeals, that court, without passing on the findings made and conclusions arrived at by the Commission or upon the merits of the plan, reversed and remanded the cause to the District Court with directions to dismiss it or, in the court's discretion, to refer it back to the Commission for further action (R. 2663).

THE DEBTOR AND ITS PROPERTIES

The Debtor was organized in 1916 to acquire and operate, pursuant to a plan of reorganization, the properties of Western Pacific Railway Company (R. 1043). At the time of filing its petition, the principal assets of the Debtor were 1207.51 miles of standard gauge railroad in the States of Utah, Nevada and California, rolling stock and equipment, and securities of certain small operating railway companies. The

Debtor's main line, 924.17 miles, runs from Oakland, California, to Salt Lake City, Utah (R. 1037). The balance of its mileage consists of branch lines springing from the main line and an additional segment of main line, known as the Northern California Extension, connecting the Debtor's line with the Great Northern (R. 1037). The Debtor also owned and operated a ferry service from Oakland to San Francisco and undivided interests in various pieces of track operated jointly with others (R. 1038-1039).

The Debtor's properties are subject to two mortgages, its First Mortgage, dated June 26, 1916, under which there are outstanding in the hands of the public $49,290,100 principal amount of 5% bonds (R. 1047) and its General and Refunding Mortgage, dated January 1, 1932, pursuant to which there have been issued $18,999,500 principal amount of bonds, all of which have been pledged to secure notes of the Debtor in the principal amount of $10,408,409.88 (R. 1053-1057). The annual fixed interest charges on said bonds and secured notes and other interest bearing obligations of the Debtor amounted to $3,177,302 (R. 9a). On August 2, 1935, the date of the filing of the petition, the accrued and unpaid interest on the Debtor's First Mortgage bonds amounted to $4,730,480.42 (R. 1022), interest having been last paid thereon on September 1, 1933 (R. 1022). On the Debtor's secured notes interest was last paid at varying dates in 1933 and 1934 so that at the time of the filing of the petition accrued and unpaid interest amounted to $396,511.92 on the notes

of the Debtor held by A. C. James Co. (R. 1023), $393,691.00 on those held by Reconstruction Finance Corporation (R. 1023-1024) and $57,307.94 on those held by The Railroad Credit Corporation (R. 1024-1025). The interest due on the First Mortgage Bonds in 1934 amounting to $2,133,800 was deferred to January 1, 1937, pursuant to an agreement to which the unsecured creditors of the Debtor were parties. That agreement provided for the subordination of the claims of the unsecured creditors [3] to the bondholders' deferred claims for interest (R. 1047-1048).

The book value of all of the Debtor's assets as of December 31, 1935, was $166,960,037.15 (R. 1062). Its investment in road and equipment and that of its subsidiaries (excluding one abandoned in 1939) less accrued depreciation on equipment as of December 31, 1938 was $144,978,559 (R. 1062-1063). The rate making valuation [4] of the Debtor's properties and that of its subsidiaries (excluding the one which was abandoned in 1939) as of December 31, 1938, was $150,907,623.49 (R. 1061-1062).

FINANCIAL HISTORY OF THE DEBTOR

Upon commencing operations in 1916, the capital liabilities of the Debtor consisted of $20,000,000 of first mortgage bonds, $27,500,000 par value of preferred stock and $47,500,000 par value of common

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[3] Western Pacific Railroad Corporation and Western Realty Company, respectively the parent and an affiliate of the Debtor.

[4] Determined under Section 19 (a) of the Interstate Commerce Act, 29 U.S.C.A., Sec. 19(a).

stock, or a total of $95,000,000. Its annual fixed charges were $1,000,000, the interest on the first mortgage bonds (R. 1044-1045).

Beginning in 1921, the First Mortgage indebtedness was increased from time to time until 1931. As of January 1, 1939, there were outstanding $49,290,100 principal amount of First Mortgage Bonds (R. 1047). In addition to the increase of its indebtedness through the issuance of First Mortgage Bonds, the Debtor in 1930 issued $5,000,000 principal amount of debentures, all of which (except $200 principal amount) were refunded in 1932 (R. 1054) by the issuance of notes in the principal amount of $4,999,800 (R. 1054). The indebtedness of the Debtor was further increased in 1932 and 1933 in the amount of $5,408,609.88 for money borrowed to meet First Mortgage bond interest and for other purposes (R. 1055-1057). At the time of filing its petition, the Debtor was also indebted to its parent corporation, Western Pacific Railroad Corporation, in the amount of $5,818,791, for advances on open account and had outstanding equipment obligations of $2,994,065 (R. 9). The increase in indebtedness between 1916 and 1933 resulted in the Debtor's annual fixed interest charges increasing from $1,000,000 to $3,177,302 (R. 9a).

While the increase in indebtedness above outlined was going on, the Debtor during part of the period (1921-1926) appeared to be prosperous. A 6% dividend was regularly paid in those years on its preferred stock and in 1925 a 5% dividend was paid on the common. The total dividend payments during those years

amounted to $13,115,920 (R. 1050-1051). In 1925 when the largest dividend payment, $4,453,420 (R. 1050), was made, the Company increased its First Mortgage indebtedness by $4,000,000 for "General Corporate Purposes" (R. 1046). In the following year, the increase in First Mortgage indebtedness for the same purposes was $2,600,000. At the same time "a substantial amount of deferred maintenance had been permitted to accrue on the Debtor's property" (R. 218) so that in 1927 dividend payments were stopped and "an Improvement Program initiated which contemplated the expenditure of approximately $18,000,000 to rehabilitate the Debtor's property" (R. 1052). $8,000,000 of the $18,000,000 Improvement Program was completed by the Debtor. The balance was undertaken by the Debtor's Trustees and the indebtedness against the property was increased by $10,000,000 through the issuance of Trustees' certificates to finance the program (R. 1028).

THE DEBTOR'S EARNINGS

The consolidated earnings of the Debtor and its subsidiaries, available for interest, for the years 1922 to 1938, as reported by the Debtor and as adjusted "to take into account (a) rehabilitation expenditures in the years 1927-1931 and 1934-1938, (b) amortization of discount on First Mortgage Bonds of the Debtor in the years 1922-1938, and (c) deductions and credits in the years 1931-1934 made by the Commission to accord with its Accounting Rules and Regulations," were (R. 1064-1066):

Year	Earnings available for Interest Reported	As Adjusted
1922	$2,306,124	$2,404,890
1923	3,313,976	3,412,234*
1924	3,144,124	3,241,823
1925	4,454,352	4,557,798
1926	4,759,282	4,868,390
1927	2,674,494	3,470,861
1928	2,964,371	4,376,972
1929	2,529,846	3,718,436
1930	1,552,487	2,381,529
1931	186,708 (D)	220,494 (D)
1932	252,706	283,912
1933	674,007	474,365
1934	1,084,244	1,396,353
1935	805,589	1,377,026
1936	181,102	1,901,423
1937	903,113 (D)	1,077,407
1938	1,243,916 (D)	255,431

(D) Deficit.

* The adjusted figure for 1923 shown (R.1065) as $4,412,234 is a typographical error for $3,412,234. See R. 2063.

For the seventeen-year period, 1922-1938, inclusive, the average earnings available for interest as adjusted were $2,292,844. For the ten years 1929-1938, inclusive, the average was $1,265,539 and for the five years 1934-1938, inclusive, the average was $1,195,528. As previously stated, the annual fixed interest charges of the Debtor at the time of the filing of its petition were $3,177,302 (R. 9a) and the then accrued and unpaid interest amounted to $5,577,991.28 (R. 1022-1025).

Although probably not significant in the determination of the questions involved (see discussion, *infra*, pp. 41-45), it may be noted that the earnings from the

properties of the Debtor have increased very substantially in the last two or three years as the result of the national defense program and later of our war effort, being greater in 1941 than the amount of the Debtor's annual fixed interest charges and running at a higher rate in 1942.

PROCEEDINGS BEFORE THE COMMISSION

Hearings on a plan of reorganization for the Debtor were held before the Commission on March 23, April 21, May 13, July 1, September 28, October 26, November 19 and December 9, 1936, at which all the parties were given an opportunity to be heard. Briefs were then filed. On August 1, 1937, the Bureau of Finance of the Commission issued a proposed report and recommended a plan (R.116). Exceptions thereto were filed and oral argument was had thereon before the full Commission on November 17, 1937. On October 10, 1938, the Commission issued its report and order (R. 194) approving a plan of reorganization of the Debtor. Petitions for rehearing and for modification of the October 10, 1938 report and order and the plan of reorganization therein approved were filed with the Commission on December 9, 1938 and on December 30, 1938 a rehearing was granted. Oral argument was had before the Commission on January 20, 1939 on the petitions for modification. On June 21, 1939 the Commission issued its "Report on Further Consideration" (R. 302-362) and made an order approving a plan of reorganization for the Debtor (R. 362-400) differing in certain respects from the plan ap-

proved in the order of October 10, 1938. On August 2, 1939, the Debtor petitioned the Commission for a rehearing and modification of the plan approved in the report and order of June 21, 1939. That petition was denied (R. 884) on September 19, 1939 and on September 28, 1939 the Commission certified (R. 1034-1035) its plan to the Court as required by Section 77.

THE COMMISSION'S PLAN

The claims against and interests in the property of the Debtor dealt with in the Commission's plan, including accrued interest to January 1, 1939, the effective date of the plan, are as follows (R. 1022-1027):

Claim or Interest	*Principal of claim or interest*	*Accrued Interest*	*Total Claim*
Trustees' Certificates	$10,000,000.00	$ ——	$10,000,000.00
Equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
Reconstruction Finance Corporation Notes	2,963,000.00	899,869.98	3,862,869.98
Railroad Credit Corporation Notes	2,445,609.88	145,314.23	2,590,924.11
A. C. James Co. Notes	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$72,448,559.88	$15,533,112.87	$87,981,672.75
Advances on Open account[a]	5,818,791.00	1,992,096.00	7,810,887.00
Total debt	$78,267,350.00	$17,525,208.87	$95,792,559.75
Preferred stock, par value $100 per share[a]	28,300,000.00	——	28,300,000.00
Common stock, par value $100 per share[a]	47,500,000.00	——	47,500,000.00
Totals	$154,067,350.88	$17,525,208.87	$171,592,559.75

[a] All owned by Western Pacific Railroad Corporation, except a small part of the open account advances owned by Western Realty Company, its wholly-owned subsidiary.

The Debtor's note indebtedness to Reconstruction Finance Corporation shown in the foregoing schedule is secured by $10,750,000 principal amount of its General and Refunding Mortgage Bonds, its indebtedness to The Railroad Credit Corporation by $4,000,000 principal amount of such Bonds and its indebtedness to A. C. James Co. by $4,249,500 principal amount thereof. These amounts aggregate $18,999,500, the entire outstanding issue of the Debtor's General and Refunding Mortgage Bonds.

The approved plan provides for a capital structure of the reorganized company as follows (R. 310, 364):

Title of issue	*Amount*	*Annual interest, dividends or other charges*
Undisturbed Equipment Obligations	$ 2,750,050	$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total Annual Fixed Charges		$494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise non-cumulative	21,219,075	954,858
Total funded debt	$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$1,949,060
Income Mortgage Sinking Fund		106,095
Participating 5% Preferred Stock ($100 par value). Dividends non-cumulative, participating share for share with Common Stock in dividends declared in any year after dividends have been declared on Common Stock at rate of $3 per share	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements		$3,647,670
Common Stock (without par value)	319,441 shs.	

The plan provides for the distribution of securities of the reorganized company among existing claimants as follows (R. 317, 390-393):

Claimants	*New First Mortgage 4% Bonds Series A*	*New Income Mortgage 4½% Bonds Series A*	*New 5% Preferred Stock Series A ($100 Par)*	*New Common Stock (No Par)*
First Mortgage Bondholders		$19,716,040	$29,574,060	230,593 shs.
Reconstruction Finance Corporation (in exchange for Trustees' Certificates and Notes)	$10,000,000	1,185,200	1,777,800	15,788 shs.
Railroad Credit Corporation		154,111	241,681	35,425 shs.
A. C. James Co.		163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

Under the plan holders of the Debtor's First Mortgage 5% bonds receive new 4½% income mortgage bonds in an amount equal to 40% of the principal of their claims, new preferred stock in an amount equal to 60% thereof and 4.67 shares of new common stock in respect of the $266.67 accrued interest per thousand dollar bond (R. 317, 390). For its claim based on the Debtor's secured notes, Reconstruction Finance Corporation receives the same treatment as the First Mortgage bondholders, in consideration of exchanging its Trustees' certificates for an equal principal amount of new first mortgage bonds. The Railroad Credit Corporation and A. C. James Co. are allotted new securities on the basis of the General and Refunding Mortgage Bonds of the Debtor securing their respective claims. The unsecured claim of Western Pacific Railroad Corporation and its interest as the owner of all of the preferred and common

stock of the Debtor were not accorded participation because they were found to have "no value" (R. 392-393).

The Commission found that the securities, $21,219,075 principal amount of income bonds, $31,850,297 par value of preferred stock and 319,441 shares of no par value common stock, allocable to the creditors of the Debtor other than holders of equipment obligations and Trustees' certificates, "represent the equitable equivalent of the debtor's assets, available for the satisfaction of claims" (R. 316). The Commission also found that "the securities remaining available for distribution after satisfying the claims of the first mortgage bondholders * * * will be inadequate in value to satisfy" the claims of "the other creditors" (R. 269). With respect to a second lien held by The Railroad Credit Corporation on the Reconstruction Finance Corporation collateral, the Commission found that "the allocation of reorganization securities to" Reconstruction Finance Corporation "exhausts the value of the collateral pledged" and that the equity "in such collateral has no value" (R. 316).

The Commission's initial report of October 10, 1938 and its report on further consideration of June 21, 1939, contain the Commission's findings, conclusions and reasons therefor. The October 10, 1938 report (R. 194-284) states the proceedings which had been had before the Commission up to that time and proceeds to an exhaustive study of (1) the "Location and General Description of the Property" (R. 197), (2)

the "Owned or Controlled and Jointly Affiliated Railroad Companies" (R. 198), (3) the "Corporate and Financial History" of the Debtor (R. 199-203); (4) the Debtor's "Present Financial Structure" (R. 203-207), (5) the Debtor's "Traffic and Revenue" (R. 207-215), (6) the "Traffic and Revenue of Subsidiaries" of the Debtor (R. 215-218), (7) the Debtor's "Earnings Available for Charges" (R. 218-224), (8) "Value for Rate Making Purposes" (R. 224), and (9) "Classes of Creditors and Stockholders" (R. 224-227). On the basis of the factual discussion under the above headings and a detailed consideration of plans of reorganization filed by the Debtor and other parties (R. 227-241), the Commission stated its findings, "conclusions and reasons therefor" (R. 241-281) as required by Section 77. As to the existing stock interest the Commission found "that the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan" (R. 269). The Commission also found that "the claims of the unsecured creditors, of the Western Pacific Railroad Corporation and of the Western Realty Company, have no value, and hence no securities or cash should be distributed under the plan in respect to those claims" (R. 269-270).

On the basis of the Commission's conclusions as to fixed charges, total charges, etc. of the reorganized company (R. 246-257), the Commission, in its initial report of October 10, 1938, stated the capitalization and the fixed, contingent and total charges of the new company as follows:

> "... the total capitalization, excluding 313,703 shares of no-par value common stock, would be $62,356,217, consisting of $3,066,117 of equipment obligations, $10,000,000 of first mortgage 4-per cent bonds, $19,716,040 of income mortgage 4-per cent bonds, and $29,574,060 of 5-per cent preferred stock. Treating the no-par-value common stock at $100 per share, the total capitalization would be $93,726,517. Total fixed interest charges would be $511,001, total fixed and contingent interest charges, plus the payments into the capital fund, and sinking fund would be $1,898,223, and preferred dividends would be $1,478,703, a grand total of $3,376,926 per annum" (R. 259).

Having set up a capital structure for the reorganized company, the Commission proceeded to consider the distribution of the new securities (R. 261-279). The first problem was a determination of the properties subject to the liens of the Debtor's two mortgages and the priorities thereof. It was admitted that the Debtor's first mortgage was a first lien "on the main line of the Debtor's railroad and the securities physically pledged under that mortgage" (R. 261). However, there was a dispute as to the Northern California Extension, various branches and spurs of the Debtor's line, as to the equity in rolling stock subject to equipment obligations and as to certain non-carrier real estate. The Commission considered the pertinent provisions of the granting clauses of the two mortgages and other relevant factors and concluded that the Debtor's First Mortgage bondholders "should be con-

sidered as having a first lien upon practically all of the assets of the debtor" [6] (R. 264-267). In deciding the lien questions, the Commission stated that the final adjudication thereof must be made by the court but that nevertheless it was necessary to determine them "preliminarily for the purpose of consideration of the plans before us" [7] (R. 262).

The October 10, 1938 report and order allocated all of the income bonds and preferred stock and 154,241 shares of the new no par common stock therein authorized to the holders of the existing First Mortgage Bonds (R. 270). The balance of the common stock, 159,462 shares, was allotted to the secured noteholders on the basis of the General and Refunding Mortgage Bonds held by them as collateral.

In its "report upon further consideration" of the October 10, 1938 report, which was issued by the Commission on June 21, 1939 after rehearing, the Commission concluded that certain modifications should be made in the plan previously approved (R. 300). Those modifications included (1) the increasing of the amount of income bonds to $21,219,075, the preferred

[6] Upon reconsideration the Commission found that certain items subject to the first lien of the General and Refunding Mortgage were of such a value as to justify the allocation of new income mortgage bonds therefor. (See *infra*, p. 53.)

[7] The District Court was wholly in accord with the Commission's conclusions on the lien questions (R. 1597) and this brief proceeds on the assumption that they were decided correctly. They will be the subject matter of briefs filed by the two Mortgage Trustees.

stock to $31,850,297 and the common stock to 319,441 shares, (2) increasing the rate of interest on the income bonds from 4% to 4½%, (3) a reallocation of securities, including an increase in the common stock allocable to the First Mortgage bondholders from 154,241 shares to 230,593, (4) allocating income bonds, preferred and common stock to Reconstruction Finance Corporation on the same basis as to First Mortgage bondholders, in consideration of the funding into new first mortgage bonds at par of the Trustees' certificates held by it, and (5) allocating income bonds, preferred and common stock to The Railroad Credit Corporation and the A. C. James Co. on the basis of the securities found on reconsideration to be allocable to the General and Refunding Mortgage Bonds securing these claims.

As the Commission expressly stated in its report of June 21, 1939, its allocation of new securities in the approved plan was "based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor" (R. 317). And in accordance with the statutory requirement, the Commission in the same report and order specifically made the over-all finding "that the plan of reorganization approved in our report and order of October 10, 1938, *supra*, modified as herein indicated, will meet with the requirements of Section 77(b) and (e) of the Bankruptcy Act, as amended, and will be compatible with the public interest" (R. 354). Section 77(e), quoted in full in Appendix A hereto, requires the determination by the Com-

mission [8] that the approved plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." This specific finding the Commission expressly declined to modify upon consideration of a petition of the Debtor for further modification of the approved plan (R. 889-890).

PROCEEDINGS BEFORE THE DISTRICT COURT

Following the certification of the plan to the District Court, that court by its order of November 8, 1939 (R. 1035) required the parties to file their objections to the plan and claims for equitable treatment on or before December 8, 1939, and set January 22, 1940 for a hearing thereon (R. 1274). In order to simplify the issues, the District Judge called a pre-trial conference which was held on December 18th to 20th, 1939. At that time, a stipulation (R. 1017-1272) of facts not in dispute was filed. On January 22, 1940 a hearing (R. 1280-1569) was had in the District Court at which witnesses were called by various of the parties in support of their objections and claims for equitable treatment. In the proceedings before the District Court, Reconstruction Finance Corporation, the Institutional Bondholders Committee and the First Mortgage Trustees supported the Commission's plan. The other parties, the A. C. James Company, The Railroad Credit Corporation, Irving Trust Company, Western Pacific

[8] See Section 77(d).

Railroad Corporation and the Debtor, objected to its approval.

On August 15, 1940 the District Court handed down its opinion (R. 1569-1600) and entered its order (R. 1600-1607) overruling the objections to and approving the Commission's plan. The District Court affirmed the finding of the Commission that the pre-preferred and common stock of the Debtor had no value and likewise affirmed the Commission's finding that the claims of the unsecured creditors had no value. The court also found that the plan was fair and equitable and complied with all the requirements of Section 77.

THE ACTION OF THE COURT BELOW

From the District Court's order of approval, the objectors in the District Court appealed to the Circuit Court of Appeals for the Ninth Circuit. That court reversed the order of the District Court and remanded the proceeding to the District Court "with directions to dismiss it, or in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action" (R. 2674).

The Circuit Court of Appeals did not purport to pass upon the merits of the plan or upon the accuracy of any of the Commission's findings or conclusions. The court took the view that other and different findings and conclusions than those made and arrived at by the Commission were necessary. The court said:

> "In this case, as has been seen, it was necessary to determine the value of (1) the debtor's

entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed.

"Lacking the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails." (124 F.(2d) at 139; R. 2671.)

The Circuit Court of Appeals also indicated that the District Court had overstated the expert character of the Commission and had misconceived the weight to be

given to the Commission's determinations. The District Court, in its opinion, said:

> "It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned." (R. 1588; 34 F. Supp. at 501.)

Referring to that statement, the Circuit Court of Appeals said:

> "The statement indicates a possible misconception * * *
>
> "In determining whether a plan of reorganization satisfies the requirements of subsection e, the Court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court." (124 F.(2d) at 140; R. 2672-2674.)

THE PARTIES AND THEIR CONTENTIONS

Reconstruction Finance Corporation, the Institutional Bondholders Committee, holders of the Debtor's First Mortgage bonds, and Crocker First National

Bank of San Francisco and Samuel Armstrong, as Trustees under the Debtor's First Mortgage, support the Commission's plan as complying with all the requirements of Section 77 of the Bankruptcy Act and challenge the holding of the court below that the Commission should have made findings other than and additional to the findings and conclusions appearing in its reports and orders embodying the plan.

The Commission's plan is objected to by (1) the Debtor, (2) Western Pacific Railroad Corporation, the Debtor's parent company, (3) A. C. James Company,[9] (4) the trustee of the Debtor's General and Refunding Mortgage and (5) The Railroad Credit Corporation. In general, the objections go to the total capitalization of the reorganized company, the contention being that the value of the Debtor's properties is sufficient to permit a larger one than that provided for in the Commission's plan. In particular the stock and unsecured creditor interests object to their claims and interests having been found to have "no value," and contend that the Commission's findings of "no value" with respect to their claims and interest are insufficient to deny them participation. The Trustee of the Debtor's General and Refunding Mortgage, together with A. C. James Company and The Railroad Credit Corporation, holders of the Debtor's General and Refunding Bonds as collateral, object to the find-

[9] A. C. James interests hold over 61% of the common stock and 40.36% of the total stock of Western Pacific Railroad Corporation, which is in turn the sole stockholder of the Debtor (R. 1051, 1528-1529).

ings of the Commission as to the liens of the Debtor's two mortgages. The Debtor joins in that objection. The same parties also object to the amount of new securities allocated with respect to the Debtor's General and Refunding Bonds. The Debtor also objects to January 1, 1939 as the effective date of the plan since it involves the accrual of interest to that date in determining the amount of creditors' claims. The Debtor would avoid interest accruals on creditors' claims by making the date of filing of the petition the effective date of the plan. A. C. James Company and The Railroad Credit Corporation object to the secured note claim of Reconstruction Finance Corporation against the Debtor being treated on the same basis as the Debtor's First Mortgage bonds, such treatment being in consideration of Reconstruction Finance Corporation exchanging the Trustees' certificates which it holds for an equal principal amount of new First Mortgage bonds. Objections are also made by some of the respondents to numerous details of the plan.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding inadequate as a basis for excluding stockholders and unsecured creditors from participation in the reorganization the Commission's findings that (1) "the equity of the existing stock has no value," and (2) "the claims of the unsecured creditors * * * have no value."

2. In deciding that the findings, "conclusions and reasons therefor" of the Commission regarding the

allocation of new securities to those entitled to share are insufficient to support that allocation.

3. In deciding that the allocation of new securities in a reorganization under Section 77 should and must be based on exact dollars and cents valuations of all claims, properties and new securities.

4. In deciding that the functions of the Interstate Commerce Commission in Section 77 proceedings are confined within narrow limits and in general misstating the relative functions of the Commission and the District Court in such proceedings.

5. In failing to affirm the decision of the District Court.

SUMMARY OF ARGUMENT

1. In excluding the stockholder and unsecured creditors from participation in the distribution of new securities, the Commission found that these claims had no value, and that the securities allocable to the junior secured creditors will be insufficient to satisfy their claims. That these findings are adequate is attested by the terms of Section 77(e), as well as by the approval of plans based on similar findings in ten recent railroad reorganization proceedings in seven district courts. See also *In re 620 Church Street Building Corp.*, 299 U.S. 24, 27 (1936). The findings, moreover, are supported by the record. Giving proper weight to the earnings and financial history of the Debtor, the Commission could not well have reached a different conclusion. *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510 (1941). The contention that a new plan is required because of wartime earnings is dangerously un-

sound, as has been recognized by the Commission and by two Circuit Courts of Appeals.

2. The requirement in the decision below of sixteen dollars and cents findings of value is excessively formalistic, unnecessary and impracticable. The findings and conclusions of the Commission are adequate to support its allocation of new securities among those entitled to participate. The First Mortgage Bonds were found to be a first lien on substantially all the Debtor's properties. The General and Refunding Bonds, held as collateral by noteholders, were found to be a first lien on a relatively small portion of the Debtor's assets, including the note and stock of a subsidiary and certain other securities, and a junior lien on the properties as a whole. Their participation was considered in the light of the assets subject to the first lien of this mortgage, the earnings, properties and traffic of the subsidiary and the dependence of its earnings on the Debtor, and in relation to the treatment of the First Mortgage Bondholders. In relation to each other, the participation of the secured noteholders, apart from the RFC, was fixed in proportion to the collateral held, since it was found that the collateral was inadequate to satisfy their claims. A practical adjustment was made for the RFC, as compensation for its exchange of Trustees' certificates, admittedly the equivalent of cash, for an equal face amount of new first mortgage bonds.

3. In stating that the District Court must exercise its independent, *de novo* judgment on all matters in reviewing a plan approved by the Commission, and

apparently that it must disregard even the expert character of the Commission as an administrative body long experienced in the railroad field, the court below misconceived the respective functions of the District Court and the Commission. Such a conception is at variance with the statutory scheme and the historical background of Section 77, with the well-established doctrine of this Court regarding the administrative finality of the Commission's decisions, and with the practical realities of railroad reorganization procedure.

Under Section 77 Congress has delegated the primary responsibility for the development of the reorganization plan to the Commission, and it is submitted that "having found that the record permitted the Commission to draw the conclusion that it did a court travels beyond its province to express concurrence therein as an original question." *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145-146 (1939). Certainly, the findings and conclusions of the Commission, in the performance of the task delegated to it by Congress, are entitled to great weight as the determinations of the expert administrative body long charged with the protection of the public interest in the railroad field. Only thus can the intent of Congress be made effective, and Section 77 rendered a workable statute for the consummation of railroad reorganizations.

Since the District Court had expressed independent approval of the plan, the statement of the Circuit Court of Appeals as to the functions of the District Court and the Commission was in any event uncalled for; but

in the interest of indicating proper and workable principles and procedure and of dispelling confusion, correction by this Court is important.

4. In view of the length of time for which these proceedings have been pending, and of the thoroughness with which all of the problems involved have been explored and determined by the Commission and the District Court, the issues here in controversy should be definitively disposed of by affirming the decree of the District Court.

ARGUMENT

I

THE FINDINGS OF "NO VALUE" ARE SUFFICIENT TO EXCLUDE THE STOCKHOLDER AND UNSECURED CREDITORS FROM PARTICIPATION, AND ARE ADEQUATELY SUPPORTED BY THE RECORD

The Commission found that the equity of the preferred and common stock had "no value" (R. 269) and likewise found that the claims of the unsecured creditors had "no value" (R. 269-270). The District Court affirmed those findings (R. 1605), and on the basis thereof decreed that "the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor" (R. 1605). It would seem to be elementary that if a claim or interest in a corporation undergoing reorganization has no value the holder thereof would not be entitled to par-

ticipation. However, the effect of the decision of the court below is that findings of "no value" are insufficient to establish as a fact that the claims or interests with respect to which such findings are made in fact have no value. The Circuit Court of Appeals did not discuss the Commission's "no value" findings nor, as a matter of fact, did it discuss any of the other numerous findings or the voluminous valuation data contained in the Commission's reports. With respect to the participation of the stockholders, that court, in its discussions of the objections of the Western Pacific Railroad Corporation, the owner of all of the stock of the Debtor, said:

> "The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939" (124 F.(2d) at 138; R. 2668).

The Court seems to have overlooked the provisions of Section 77(e) for the exclusion of both stockholders and creditors from participation in a plan which are as follows:

> "*Provided,* That submission to any class of stockholders shall not be necessary if the Com-

> mission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation was insolvent, or that at the time of the finding the equity of such class of stockholders has no value, * * * *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, * * * that at the time of the finding the interests of such class of creditors have no value * * *." [10]

The unambiguous language of the above provisions would seem to make it perfectly clear that any class of stockholders may be excluded from participation either by (1) a finding that—"the corporation is insolvent" or (2) a finding that—"the equity of such class of stockholders has no value," and that a class of creditors may likewise be excluded from participation on a finding of "no value." That alternative courses in excluding stockholders from participation were intended by Congress is emphasized by the fact that the second alternative was written into subsection

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[10] The subsection further provides that: "the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection * * *." The following subsection (*f*) provides that upon confirmation:

> "the plan * * * shall, * * * be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors, secured or unsecured, whether or not adversely affected by the plan * * *, including creditors who have not, as well as those who have, accepted it."

(e) of Section 77 by the 1935 amendments [11] to Section 77.

In addition to overlooking the Commission's findings of "no value" regarding the claims and interests of unsecured creditors and stockholders, the court below apparently overlooked a confirmatory finding. With respect to the securities allocable to the secured creditors other than to the First Mortgage bondholders, the Commission found that "they will be inadequate in value to satisfy the claims" of such creditors (R. 269). Furthermore the court seems to have overlooked the decision of this Court in *In re 620 Church Street Building Corp.*, 299 U. S. 24 (1936). In that case the Supreme Court stated:

> "* * * Petitioners insist that their consent to the plan of reorganization was necessary or that their claims should have been accorded 'adequate protection'. But the adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens' affected. *Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioners' claims were appraised by the court as having 'no value.'* There was no value to be protected." (299 U. S. at 27; italics supplied.)

The court below, in holding that a valuation of all of the Debtor's property was necessary, relied upon the decision of this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941). Under

[11] Act of August 27, 1935, c. 774, 49 Stat. 911.

the plan in that case, stockholders were participating although it appeared probable from the record that claims of creditors were not being satisfied. Obviously, as between stockholders and creditors, if stockholders are to participate in a reorganization, it would have to appear affirmatively that there was value in the properties in reorganization over and above that necessary to satisfy creditors. On the other hand if creditors cannot be satisfied in full, the making of a finding of the value of all of the Debtor's properties could serve no useful purpose other than to determine how far the stock was under water. In terms of mathematical accuracy, such a finding would only prove by how much the claims of creditors could not be satisfied, and would add no information of legal significance.

Since the decision of the court below was announced, the Circuit Court of Appeals for the Seventh Circuit has passed upon plans of reorganization for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company [12] and for the Chicago and North Western Railway Company [13] and the Circuit Court of Appeals for the Sixth Circuit has affirmed a decree confirming a plan of reorganization for the Akron Canton and Youngstown Railway Company.[14] In all three cases the plans excluded stockholders from

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[12] 124 F. (2d) 754 (C.C.A. 7th, 1941), and unreported supplemental opinion (C.C.A. 7th, January 12, 1942).

[13] 126 F. (2d) 351 (C.C.A. 7th, 1942).

[14] *Akron Canton & Youngstown Railway Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C. C. A. 6th, 1942).

participation on findings of "no value," except that in the Akron case the stockholders were given warrants entitling them to purchase new securities. In the North Western case the Circuit Court of Appeals sustained the District Court which had confirmed the plan certified by the Commission. In the Milwaukee case the Circuit Court of Appeals reversed the District Court which had approved the Commission's plan. However, both these cases, the findings by the Commission that the equity of the stockholders had no value were sustained as sufficient to exclude stockholders from participation. In the Milwaukee case, the court said in part:

> "We are well satisfied that the evidence supports the finding of the Commission approved by the District Court 'that the equity of the holders of the debtor's preferred stock and its common stock has no value'." (124 F. (2d) at 764.)

On a motion to modify the opinion, insofar as it approved the Commission's finding of "no value" in the stock, the court reaffirmed its previous position:

> "Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I.C.C. as to absence of value of old common and preferred stock is specific, definite and certain, and fully meets the rule which requires finding on values of assets." [15]

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[15] *In re Chicago, Milwaukee, St. Paul & Pacific Railway Company*, unreported supplemental opinion (C.C.A. 7th, January 12, 1942).

In the North Western case the Commission's finding of "no value" of the preferred and common stock was likewise approved:

> "There are three vital, determinative questions, (and numerous less important questions) presented by this appeal.
>
> "(a) The finding, and the sufficiency of the evidence to support it, that the common and preferred stock of the old company are without value."
>
> * * * *
>
> "The finding which determined the absence of value in the common and preferred stock must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (126 F. (2d) at 360, 364.)

Plans for the reorganization of other railroads approved [16] and certified by the Interstate Commerce

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[16] *Chicago & Easton Illinois Ry. Co. Reorg.*, 230 I.C.C. 199, 233 (1938); *Chicago & North Western Ry. Co. Reorg.*, 236 I.C.C. 575, 637 (1939); *Chicago, Great Western R. Co. Reorg.*, 228 I.C.C. 585, 626 (1938); *Chicago, Milwaukee St. Paul & Pacific R. Co. Reorg.*, 239 I.C.C. 485, 571 (1940), 240 I.C.C. 257, 273 (1940); *Denver & Rio Grande Western R. Co. Reorg.*, 233 I.C.C. 515, 580 (1939), 239 I.C.C. 583 (1940); *Fort Dodge, Des Moines & Southern R. Co. Reorg.*, 244 I.C.C. 625, 646 (1941); *Kansas City, Kaw Valley & Western R. Co. Reorg.*, 221 I.C.C. 15, 24 (1937), 236 I.C.C. 137, 139 (1939); *Missouri Pacific R. Co. Reorg.*, 239 I.C.C. 7, 132 (1940); *New York, New Haven & Hartford R. Co. Reorg.*, 239 I.C.C. 337, 418 (1940), 244 I.C.C. 239, 242 (1941); *Oregon Pacific & Eastern Ry. Co. Reorg.*, 233 I.C.C. 187, 194 (1939); *Savannah & Atlanta R. Co. Reorg.*, 224 I.C.C. 197, 215 (1937); *Spokane Intern'l Ry. Co. Reorg.*, 228 I.C.C. 387, 403 (1938), 233 I.C.C. 157 (1939); *St. Louis-San Francisco Ry. Co. Reorg.*, 240 I.C.C.

Commission and excluding stockholders from participation on findings of "no value" [17] have been approved by the District Courts in:—

In re Chicago and Eastern Illinois Ry. Co., unreported opinion, (D.C.N.D. Ill. E.D., June 16, 1935);

In re Chicago & North Western Ry. Co., 35 F. Supp. 230, 247 (D.C.N.D. Ill. E.D., Sept. 11, 1940), affirmed 126 F.(2d) 351 (C.C.A. 7th, 1942).

In re Chicago Great Western R. Co., 29 F. Supp. 149, 160 (D.C.N.D. Ill. E.D., Sept. 9, 1939);

In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 36 F. Supp. 193, 204 (D.C.N.D. Ill. E.D., 1940), reversed on other grounds but with approval of the holding mentioned, 126 F. (2d) 351 (C.C.A. 7th, 1941) and unreported supplemental opinion (C.C.A. 7th, January 12, 1942);

In re Kansas City, Kaw Valley & Western R. Co., unreported opinion, (D.C.D. Kansas, 1st Div., Sept. 25, 1940);

In re Missouri Pacific R. Co., 39 F. Supp. 436, 443, (D.C.E.D. Mo. E.D., June 20, 1941);

In re Oregon Pacific & Eastern Ry. Co., unreported opinion, (D.C.D. Oregon, Sept. 9, 1939);

In re Savannah & Atlanta Ry. Co., unreported opinion, (D.C.S.D. Ga., Feb. 5, 1938), C.C.H. Bankruptcy Law Service §51,448:

383, 424 (1940), 242 I.C.C. 523, 525 (1940); *Yosemite Valley Ry. Co. Reorg.* 244 I.C.C. 337, 418 (1940), 244 I.C.C. 239, 242 (1941).

[17] No plan has been disapproved for this reason.

In re Spokane International Ry. Co., unreported opinion, (D.C.E.D. Wash. N.D., March 2, 1940), C.C.H. Bankruptcy Law Service, §52,567;

In re Yosemite Valley Ry. Co., unreported opinion (D.C.S.D. Cal. N.D., Oct. 28, 1941).

THE RECORD SUPPORTS THE FINDINGS OF "NO VALUE"

In the court below and in the District Court, the stock interests [18] took the position that there was in fact value for the stock of the debtor and that the stock was entitled to participation. That position was taken despite the fact that the plan submitted to the Commission by the A. C. James Company provided (R. 101, 106-108) for the surrender by Western Pacific Railroad Corporation of all of the stock of the Debtor for distribution to creditors, the Reorganization Committee, and for retention in the treasury of the Company, and despite the fact that the plan submitted by the Debtor provided for the cancellation of an unsecured claim of over $5,000,000 held by Western Pacific Railroad Corporation (R. 19, 22).

The Commission's initial report (R. 194) and its report on further consideration (R. 300) are replete with factual data regarding the Debtor's property and its earnings. It appears that for the years 1926 to 1935, inclusive, the operating ratio of the Debtor—that is, the percentage of gross revenues consumed in operations—increased from 70.3% in 1926 to 83.7% in 1935 (R. 139-140). As a result the Debtor's earn-

[18] The Debtor, the Western Pacific Railroad Corporation, the owner of all stock of the Debtor, and the A. C. James Company. See *supra*, p. 23, footnote 9.

ings available for charges were decreasing and as previously pointed out (page 8) the Debtor began borrowing money to pay interest approximately two years before the filing of its petition. In no year between 1930 and 1938 were the earnings of the Debtor equal to the amount of its fixed charges at the time of the filing of its petition (R. 1064-1066). The average for those years is $1,265,539 or somewhat less than one-half the fixed charges under the present capital structure. Furthermore even the Debtor's estimates before the Commission of income available for interest for the years 1936-1940, inclusive, averaged $2,715,306 (R. 221).[19] The Commission also had before it the financial history of the Debtor (pp. 6-8 *supra*). In addition to failing to earn its interest charges, the Debtor had not been meeting its obligation to the public of maintaining its properties (R. 202-203). The financial history of the Debtor was one of debt, dividends and deferred maintenance. In addition to earnings and financial history the Commission had before it and gave consideration to the value of the Debtor's prop-

[19] The amounts forecast by witnesses for the Debtor as being available for fixed charges in the years 1936 to 1940, inclusive (I.C.C. Ex. 29; R. 221-222, 2027), together with the actual amounts so available (R. 1065-1066, 2629, 2635), were as follows:

	Estimated by Debtor	*Actual (as adjusted)*
1936	$1,524,086	$1,901,423
1937	2,342,586	1 077,407
1938	2,929,586	225,431
1939	3,652,486	1,519,916
1940	4,056,486	2,648,492

erties for rate making purposes (R. 224), book values and liabilities (R. 203-207), the Debtor's traffic (R. 207-215), traffic and revenues of subsidiaries (R. 215-218) and other factors too numerous to mention without quoting pages of the Commission's reports, particularly pages 195-224 of the record.

Throughout the proceedings the stock interests have contended that either the capitalization of the reorganized company should be larger so that there will be more securities to distribute, or the claims of the various classes of creditors, except the unsecured creditors (who received nothing under the plan), should be cut down so as to leave something over for distribution to stockholders. The increase would be brought about by disregarding earnings, or, if earnings were to be considered at all, the argument appears to be that earnings in these abnormal war years, after the close of the Commission's hearings, should be the basis rather than earnings in normal years. As for a decrease in the creditors' claims, the Debtor argued in its brief in the court below with respect to interest after the filing of the petition:

> "there are no interest *accruals* after that date. Interest actually earned, however, belongs to the lien upon which it was earned."

That argument of the Debtor apparently was not taken seriously by the Circuit Court of Appeals since in referring to claims throughout its opinion accrued and unpaid interest to the effective date of the plan was

included. In the light of this Court's decision that "interest is entitled to the same priority as principal" (*Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 527 (1941)) the question of the accrual of interest is not now open to dispute.

The Debtor's contention that there is value in the property for the stockholders has been based on the assertion that the Commission considered only depression earnings and that the present earnings, the facts with respect to which were not before the Commission, should be given such weight as to justify a scrapping of the Commission's plan and making provision for participation by the stockholders. That the Commission did not consider only depression earnings is evidenced by the Commission's reports themselves in which every relevant fact regarding the Debtor and its properties was weighed. These facts included the Debtor's own estimates of future earnings (R. 221). The Commission also had before it plans suggested by the Debtor (R. 19), by the First Mortgage Bondholders (R. 48) and by the A. C. James Co. (R. 101). Each of those plans substantially reduced fixed charges. Under the Debtor's plan, fixed interest would be $905,321 (R. 245). Under the Bondholders' plan, fixed interest would be $905,322 (R. 245). Under the James' plan, fixed interest would be $511,001 (R. 245). It will be recalled that the fixed charges on the Debtor's existing capitalization are over $3,000,000 (R. 9). In other words, not one of the interested parties even suggested that a reorganized Western Pacific could meet

the fixed charges under the present capitalization. Thus, even the opponents of the Commission's plan have agreed that creditors must make sacrifices, for they cannot be fully satisfied. In that situation the participation of stockholders is an impossibility. *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941).

Furthermore, the contention that the plan is based on depression earnings is answered by the fact that $1;181,528, the average system earnings available for interest for the five years ending December 31, 1938 (R. 1548), would not be sufficient to meet full interest on the new income mortgage bonds ($1,949,060 required) and there would be nothing for that part of the creditors' claims to be exchanged for preferred and common stock. In order to meet the fixed and contingent charges under the new capitalization, pay a 5% dividend on the preferred stock and a $3.00 dividend on the common stock, the reorganized company would have to show earnings after taxes of $4,499,898. That amount is in excess of the Debtor's earnings for any year since 1926 for which the figures were before the Commission. In other words, the Commission, in providing a capitalization of the new company, took an optimistic view of the future and provided for the issuance of securities beyond anything that could have been thought of if depression earnings had been the prime consideration. The Debtor's average earnings, as adjusted, for the ten years 1929-

1938, inclusive, were $1,265,539. If that figure were capitalized on a 5% [20] basis, the amount would be $25,230,780. In fact, the Commission's total capitalization is $65,829,422, plus 319,441 shares of no par common stock. The contention that depression earnings were the basis of the plan will not hold water.

The present high earnings, resulting from wartime traffic, were carefully considered by the District Court in these proceedings on a motion to use $3,000,000 of the Trustees' cash to retire an equal amount of Trustees' certificates. In denying the motion, the court said:—

> "The increased earnings lately reported may disappear as rapidly as they have accumulated. In these grave and uncertain times, there is no knowing what may happen in the matter of increased cost of maintenance and operation. Recently the President of the railroad has called the attention of the Trustees to the necessity for the expenditure of about $4,000,000 for necessary new equipment, and the Court will soon be asked to approve the program." [21]

Early this year the Circuit Court of Appeals for the Seventh Circuit in considering the decree of the District Court, which had confirmed the plan of reorgan-

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[20] See *Atlanta, Birmingham and Coast R. R. Co.* v. *United States*, 296 U. S. 33 (1935).

[21] *In re Western Pacific Railroad Company*, 38 F. Supp. 877 (D.C.N.D. Calif., 1941), appeal dismissed 122 F. (2d) 807 (C.C.A. 9th, 1941).

ization for the Chicago and North Western Railway Company, was confronted with the same argument by the stockholders there as was made below in this case. In dealing with the question, that court said:—

> "The unusual and extraordinary increases in revenue of carriers during the last year have made the Commission's estimate the subject of determined and vigorous attack by the stockholders. This has caused us no end of anxiety and concern. This radical change (for the better) in the past year can not and should not be ignored. Nor can we dismiss it as undisclosed by the record which deals with a more distant past. It is something we can, and should, and do, take judicial notice of. It is, we believe, temporary, and like a crop failure year, in the Northwest—which this Debtor serves—not to be taken too seriously when viewing the long future of this railroad. In making this statement we are aided by the experiences of railroads during and after the last war." *In re Chicago and North Western Railway Co.*, 126 F. (2d) 351, 364 (C.C.A. 7th, 1942).

The question of the effect to be given to the abnormal earnings of railroads in these war years was also considered by the Circuit Court of Appeals for the Sixth Circuit in an appeal from the order of confirmation of the Commission's plan for the reorganization of the Akron, Canton & Youngstown Railway Company. The Circuit Court of Appeals in that case

took the long term view as was done by the Circuit Court of Appeals for the Seventh Circuit and in disposing of the question said:

> "Appellants lay great stress on the fact that for 1940 the debtors earned $498,029.00 and that for twelve months ending October 31, 1941, the earnings available for interest and dividends were $732,190. It is conceded that these abnormal increases are solely attributable to the prosecution of the war effort of the Government. These abnormalities are not proper tests by which to measure the Commission's determination of the somewhat imponderable prospective earnings in 1937. Subsequent earnings due to unforeseeable circumstances may not be used to check the correctness of prospective earnings as determined by the Commission under the Act." [22]

The Commission in approving two recent plans of reorganization has specifically rejected the war earnings as a basis for a permanent capitalization of the reorganized company. *St. Louis Southwestern Railway Company Reorganization*, 249 I.C.C. 5 (1941), 252 I.C.C. 325 (1942); *Florida East Coast Railway Company Reorganization*, not yet reported (Finance Docket No. 13170, April 6, 1942 and August 10, 1942). In the latter decision the Commission stated:

> "In the report of April 6, 1942, Division 4 recognized the fact that 1941 earnings were influenced by the extraordinary conditions exist-

[22] *Akron, Canton & Youngstown Railway Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C.C.A. 6th, 1942).

> ing as the result of the war and in the report stated fully all considerations leading to its conclusions as to justifiable amounts of capitalization and of new general mortgage bonds. Under present conditions, the fact that the year 1942 gives promise of producing even larger earnings than 1941 affords too uncertain and precarious a basis to justify the increases sought."

The present Director of the Office of Defense Transportation, when he was still Chairman of the Interstate Commerce Commission, issued a timely warning:

> "Let me suggest, however, that those who regard these present earnings as evidence of the unsoundness of our reorganization plans may well give heed to the source from which these earnings spring and to the future conditions which are likely to flow from the same source. * * * All this in the end means burden and sacrifice for all concerned." [23]

To base a capitalization on the inflated earnings of a war economy would not only be to invite but also to guarantee future financial disaster for the reorganized company. There is an important public interest in sound capitalizations for railroad companies. If railroads are to perform the function to which their properties are primarily dedicated,[24] namely, providing safe

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[23] Hon. Joseph B. Eastman, Address before National Association of Mutual Savings Banks, Philadelphia, May 7, 1941.

[24] *Union Trust Company* v. *Illinois Midland Railway Company*, 117 U.S. 434, 455-456 (1886); *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 190 Fed. 609, 618 (C.C.S.D. New York, 1911).

and efficient transportation for the public, they must be so capitalized when created as to avoid, as far as possible, being involved in financial difficulties within the foreseeable future. Their capital structures should be such that new money for necessary improvements would be readily available. Otherwise, they will fail in the performance of their duty to the public. Aside, however, from the public interest in sound capitalizations the fact is that the Debtor has an unsupportable debt structure and there is no alchemy for changing a debt-ridden property into a solvent going concern which does not at the same time change its ownership unless the stockholders supply the catalytic agent—a substantial number of dollars. The dollars that might have left the Debtor a going concern went as dividends in 1921 to 1926. The stockholders took their "value" out of the properties then—if not also some properly belonging to creditors. The debt, dividends and deferred maintenance of the 1921-1926 period sapped the Debtor's vitality and spelled its eventual financial disaster. True, upon the acquisition of the stock of the Debtor by Western Pacific Railroad Corporation in 1927 the policy of paying dividends while maintenance was being deferred was changed (R. 1052). However, the damage had been done and the company was not able to make up the deferred maintenance in its properties.

The Commission was therefore unquestionably correct in finding, and the District Court in approving the findings, that the equity of the stockholders and the

claims of the unsecured creditors of the Debtor were without value; and such determination required the exclusion of these interests from participation in the reorganized company. As the Circuit Court of Appeals for the Seventh Circuit pointed out in *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 F. (2d) 754, 763 (1941):

> "* * * Neither the Commission nor the court is authorized or permitted to give these stockholders anything, if the Debtor's assets are of a value less than the aggregate of its debts. Consolidated Rock Products Co. v. DuBois, 312 U. S. 510, 61 S. Ct. 675, 685, 85 L. Ed. 982; Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. 110; Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 23 S. Ct. 554, 57 L. Ed. 931. It is not a matter of discretion. The absolute priority principle forbids it."

II

THE FINDINGS AND CONCLUSIONS OF THE COMMISSION ARE SUFFICIENT TO SUPPORT ITS ALLOCATION OF THE SECURITIES OF THE REORGANIZED COMPANY AMONG THOSE FOUND TO BE ENTITLED TO SHARE THEREIN.

THE SECURITIES AVAILABLE FOR ALLOCATION

The Commission found that the securities provided for in the plan for distribution to creditors of the Debtor "represent the equitable equivalent of the debtor's assets available for the satisfaction of claims"

(R. 316). Those securities consist of $21,219,075 of income mortgage bonds, $31,850,297 of preferred stock and 319,441 shares of no-par-value common stock (R. 316). In addition, the plan provides for the issuance of $10,000,000 principal amount of first mortgage bonds, exchangeable in part consideration for a like principal amount of Trustees' certificates, and the assumption of existing equipment obligations.

As previously pointed out, pp. 14-15, *supra*, the Commission's reports show an exhaustive study of the Debtor and its properties from every angle. Based on those studies, the Commission arrived at a number of subsidiary conclusions, which in turn form the basis for the above finding. The principal of those subsidiary conclusions, in its initial report, are:

1.

"the fixed charges of the reorganized company should not initially and substantially exceed $500,000, if the reorganized company is to maintain its property properly and to secure 'necessary new capital in the future' " (R. 246).

2.

"We conclude, therefore, after a consideration of the debtor's past, present, and probable future earnings, that the plan of reorganization should provide for the immediate issue and sale of not to exceed $10,000,000 of new first mortgage bonds, the proceeds of which should be used to retire outstanding trustees' certificates." (R. 246-247.)

3.

"To avoid embarrassment in the securing of funds, especially for future routine additions and betterments, which are estimated by the debtor $500,000 annually, we find that the plan should provide for the creation of a capital fund out of the available net income remaining after the payment of fixed charges." (R. 250.)

4.

"On the basis of the facts heretofore recited with respect to traffic and earnings, we find that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital fund and sinking funds should not exceed $2,000,000 per annum." (R. 253.)

5.

"In order to allot as large an amount of new bonds as possible to present creditors, we find that the new income bonds should bear interest at the rate of 4% per annum. We further find that the principal amount of such bonds should not exceed $19,716,040." (R. 254.)

6.

"As hereinbefore stated, the debtor's estimate of income available for interest averaged $2,715,306 per year for the period 1936-40, inclusive, the maximum amount for any one year in the period (1940) being $3,769,836. That amount, with prior charges of $1,898,-

223, would permit the payment of dividends at the rate of 5% on only $37,432,000 of stock. It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed 295,740-3/10 shares of preferred stock of the par value of $100 per share, and not more than 313,703 shares of no-par-value common stock." (R. 257.)

Following a rehearing, the Commission approved an increase in the amount of income bonds from $19,716,040 to $21,219,075 and provided that the interest rate thereon should be 4½% instead of 4% as specified in its initial report. The amounts of preferred stock and common stock also were increased from 295,740-3/10 to 318,502-97/100 and

313,703 to 319,441 shares, respectively (R. 254, 257, 310).

The court below, in its opinion, does not mention any of the above quoted conclusions and very little of the great mass of factual data contained in the Commission's reports. The Court apparently thought that there was some requirement of formalism with respect to the Commission's reports. That phase of the case is discussed later (pp. 62 to 68, *infra*). True, the Commission's conclusions are not stated as "findings" would be stated in the decree of a court but there is no difficulty either in understanding them or in working from them in the setting up of a capital structure for the reorganized company. And the above quoted parts of the Commission's reports are not merely conclusions; they are, as required by Section 77, "conclusions and reasons therefor." True, those parts do not contain the full statement of the reasons for the conclusions. That would require the quotation of the Commission's reports almost *in toto*.

THE ALLOCATION OF NEW SECURITIES IS FAIR AND EQUITABLE

On the basis of its many other conclusions[25] and its consideration (R. 241-244) of the requirements of Section 77 the Commission in its report on further consideration concluded:—

> "We find that the plan of reorganization approved in our report and order of October 10,

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[25] See, for example, R. 241-281, 307, 309, 312, 315, 317, 324, 329, 336, 340, 345, 347, 353.

1938, supra, modified as herein indicated, will meet with the requirements of section 77 (b) and (e) of the Bankruptcy Act, as amended, and will be compatible with the public interest" (R. 354).

Under the plan approved by the Commission $2,750,050 principal amount of equipment obligations were to be left undisturbed, and $10,000,000 of new first mortgage bonds issued to fund the $10,000,000 of Trustees' certificates held by Reconstruction Finance Corporation. These two allocations having exhausted the fixed interest securities available under the new capitalization, the Debtor's old First Mortgage Bondholders, in recognition of their first lien upon substantially all of the Debtor's properties, were allocated $19,716,040 principal amount of new income bonds, $29,574,060 par value of new preferred stock and 230,593 shares of new common stock without par value, and Reconstruction Finance Corporation, in consideration of its exchange of the Trustees' certificates held by it for new first mortgage bonds on a par for par basis, was given in respect of its claim on the Debtor's secured notes treatment on the same basis as the old First Mortgage Bondholders.[26] While the Debtor's First Mortagage bondholders were thus required to make substantial sacrifices, compensation thereof was provided in the allocation of the new stock to them at a lower price than that at which it was allocated to junior interests, in the opportunity to share through stock

[26] The practical adjustment involved in this procedure is discussed *infra*, pp. 56-62.

ownership in possible earnings of the reorganized company, and in the control of that company through the ownership of a substantial majority of its preferred and common stock.

In consideration of their first lien upon certain assets of the Debtor, and of their junior claims upon the Debtor's assets as a whole, the Commission under its approved plan determined that there was allocable in respect of the Debtor's General and Refunding Mortgage Bonds $732,010 principal amount of new income bonds, $1,147,955 par value of new preferred stock and all of the new common stock remaining after prior allocations. All of the General and Refunding Mortgage Bonds were pledged with the Debtor's three note creditors. The Commission found that the securities allocable to such Bonds were inadequate in value to satisfy the claims of the note-holders and that the value of each of the claims was accordingly proportionate to the collateral securing it (R. 271). The new securities —except for the separate treatment of the claim of Reconstruction Finance Corporation explained below [26a] —were therefore divided between the Debtor's noteholders in proportion to the amount of General and Refunding Mortgage Bonds held by them as collateral for their respective notes.

[26a] See pp. 56-62, *infra*. The income bonds and preferred stock which Reconstruction Finance Corporation would have received had it been solely a noteholder were included in those allocated to it on the basis described below, and the shares of common stock allocable to it as a noteholder in excess of those in fact allocated to it were in effect reallocated to the other noteholders.

Other than the expedient that was necessarily resorted to from practical considerations to provide for the taking care of the outstanding Trustees' certificates, the allocation of the new securities was comparatively simple because of the fact that the claims (other than those found to have no value, the equipment obligations, which were to be assumed, and the Trustees' certificates) were based on First Mortgage Bonds of the Debtor and on notes of the Debtor, secured by its General and Refunding Mortgage Bonds. The first step, therefore, involved a determination of the properties subject to the liens of the two mortgages.

In its original report the Commission, after considering the granting clauses of the two mortgages, concluded that the Debtor's First Mortgage bondholders "should be considered as having a first lien upon practically all of the assets of the Debtor." (R. 267). Upon rehearing, the question of the liens of the two mortgages was reargued and upon reconsideration the Commission determined that certain assets, subject to the Debtor's General and Refunding Mortgage as a first lien, required "a re-examination of the allocation of new securities to the holders of the debtor's notes secured by the general and refunding bonds." (R. 312-313). In general, the First Mortgage was determined to be a first lien on the Debtor's lines of railroad. The Refunding General and Mortgage was determined to be a first lien on:

1. The funded debt ($508,278) and 97.5% of the capital stock of Tidewater Southern

Railway Company, an operating railway company,

2. $270,000 principal amount of bonds and $360,834 par value of the stock of Central California Traction Company.

3. $465,300 par value of capital stock of Alameda Belt Line, and

4. Cash in the amount of $223,732 (R. 313).

The Debtor's holdings in the Central California Traction Company represent a one-third ownership along with the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Company (R. 314). The Debtor's holding in the Alameda Belt Line is a one-half interest, the other half being owned by the Atchison, Topeka & Santa Fe Railway Company (R. 315).

Much was made in the court below of the contention that the earnings of the Tidewater Southern Railway Company, in effect wholly owned by the Debtor, justified a larger participation by the General and Refunding Mortgage bondholders in the income bonds of the reorganized company. This subsidiary and the character of its earnings and properties, the nature of its traffic and its dependence upon the Debtor, were carefully considered by the Commission, which concluded that the allocation of additional securities to those provided in its report on further consideration would not be justified. Such a contention also overlooks the fact that Central California Traction Company and Alameda Belt Line, whose securities are likewise subject to the first lien of the General and Refunding Mort-

gage, are poor relations and that it is necessary for them to be supported. For example, in 1934 and 1935, although the Central California Traction Company reported net income of $48,690 and $6,314 respectively, the parent companies at the same time were called upon to contribute to its support $91,638 in 1934 and $61,373 in 1935 (R. 315). During the same years the contributions of the two parent companies of the Alameda Belt Line were $18,305 and $27,727 while the Company was reporting no net earnings in 1934 and $480.00 in 1935. For the ten year period 1929-1938, inclusive, the portions of the income and profit and loss deficits of the Central California Traction Company absorbed by the Debtor, amounted to $319,194, an average of $31,919 per year (R. 1101). For the eleven year period 1928-1938, inclusive, the portions of the deficits of the Alameda Belt Line, absorbed by the Debtor, aggregate $243,035, an average of $22,095 per year (R. 1105). If the allocation of the income bonds had been made on the basis of the average earnings applicable to the properties determined to be subject to the two mortgages as first liens, reducing the earnings of the Tidewater by the average contributions of the Debtor to the support of the other two companies and allowing 4% interest on the cash in the hands of the mortgage trustee, the allocation would be within a hair's breadth of that made by the Commission.

On the basis of a complete statement of the elements of value, other factual data and earnings of the assets securing the General and Refunding Bonds (R. 313-

315), the Commission concluded in its report on further consideration that "the creditors secured by the general and refunding mortgage bonds should be awarded new income mortgage bonds in the amount of $732,010, and new participating preferred stock of a par value of $1,147,955" (R. 315), as well as the shares of new common stock available after satisfying prior claims. In view of the inadequacy of their security, and subject to the practical provision with respect to RFC's claim, these securities, as pointed out above, were then allocated to the secured noteholders in proportion to their collateral.

THE ALLOCATION OF NEW SECURITIES TO RECONSTRUCTION FINANCE CORPORATION IS FAIR AND EQUITABLE

The allocation of new securities to Reconstruction Finance Corporation is one of the subjects of attack on the Commission's plan.

At the time the plan was approved, Reconstruction Finance Corporation (hereinafter sometimes called RFC) held and now holds certificates of indebtedness issued by the Trustees, in the then principal amount of $10,000,000 (reduced to $9,625,000 as of August 15, 1942). These certificates are secured by a first lien on all the property of the Debtor, rank as expenses of administration and are entitled to payment in cash. That is not in dispute. RFC also holds notes of the Debtor which, with accrued interest to the effective date of the plan, January 1, 1939, amounted to $3,862,869 (R. 391). Those notes are secured by $10,-

750,000 principal amount of the Debtor's Refunding and General Mortgage Bonds (R. 225)."[27]

The plan treats the RFC position (Trustees' certificates and secured notes) as a whole by providing:

> "3. The Reconstruction Finance Corporation shall receive in respect of the $10,000,000 of new money provided for in subdivision O (or the surrender of trustees'-certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of $2,963,000, together with $899,870 of interest accrued and unpaid thereon to Janu-

[27] The notes are also secured by all right, title and interest of the Western Pacific Railroad Corporation in 150,000 shares of the common capital stock of The Denver & Rio Grande Western Railroad Company (R. 226). The stock of The Denver & Rio Grande Western Railroad Company has been found to have no value in the reorganization proceedings of that Company (*Denver & Rio Grande R. R. Reorganization*, 233 I.C.C. 515, 580 (1939), 239 I.C.C. 583 (1940), (Finance Docket No. 11002, July 13, 1942, not yet reported). The Railroad Credit Corporation also holds some collateral put up by Western Pacific Railroad Corporation (the Debtor's parent company) and it was argued below that the plan was defective in not making provision for the disposition of the so-called "third party" collateral. The answer is so obvious that we merely mention it and point out that the confirmation of a plan is court action with respect to property and under Section 77 the jurisdiction of the court extends only to "the debtor and its property" (Section 77(a)). If the plan had attempted to deal with the "third party" collateral, the confirmation of the plan would have been beyond the jurisdiction of the court. *Cf. In re Diversey Building Corp.*, 86 F. (2d) 456 (C.C.A. 7th, 1936), *certiorari* denied 300 U. S. 662 (1937); *In re Nine North Church Street, Inc.*, 82 F. (2d) 186 (C.C.A. 2d, 1936). Accordingly, the plan provides for the surrender only of collateral "pledged by the Debtor." (R. 345, 394.)

ary 1, 1939, approximately $10,000,000 of new first-mortgage 4 percent bonds, series A (being 100 percent of said new money); $1,185,200 of income-mortgage 4½-percent bonds, series A (being 40 percent of the principal of said claim); $1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken at the price of $57 a share for 100 percent of said accrued and unpaid interest)" (R. 391).

If the treatment of the Trustees' certificates and the Debtor's secured notes held by RFC could be separated, as the respondents have contended they should be, and the new first mortgage bonds considered as allocated alone to the Trustees' certificates and the income bonds, preferred and common stock which RFC receives under the plan, allocated to the secured claim alone, three things would be clear:

1. That the RFC as the holder of the Trustees' certificates, with their inherent right of payment in cash, was not being fully compensated,

2. That the allocation of income bonds and preferred stock in respect of the General and Refunding Mortgage Bonds held by RFC as collateral to the Debtor's notes is on a more favorable basis than the allocation of those securities to The Railroad Credit Corporation and A. C. James Co., likewise holders of the General and Refunding Mortgage Bonds as collateral for the Debtors' notes held by them, and

3. That the allocation of common stock to

RFC is not on as favorable a basis as the allocation to The Railroad Credit Corporation and A. C. James Co.

The reason for the treatment of the RFC position as a whole was the necessity of either providing for $10,000,000 of new money to retire the Trustees' certificates or providing in some way adequate compensation for the surrender of the senior rights inhering in the Trustees' certificates. The payment in cash was not possible other than through the sale of new first mortgage bonds, and obviously, first mortgage bonds of a comparatively small railroad such as the Debtor, with a rather unfavorable financial history, would not sell at par. Also there were only $10,000,000 of such bonds available. That the new bonds would not sell at par was recognized by all parties. The Debtor's original plan provided that $10,000,000 of new money should be furnished by RFC and in consideration thereof RFC would receive for its claim on the secured notes of the Debtor held by it, the same treatment as that accorded to the holders of the Debtor's First Mortgage Bonds (R. 22, 28-29). The first plan (R. 85) filed by the Institutional Bondholders Committee provided for a stock bonus of 150,000 shares of new common stock to the purchaser of $10,000,000 principal amount new first mortgage bonds. The A. C. James Co. plan (R. 104) contemplated a similar bonus and a second plan filed by the Institutional Bondholders Committee suggested the very treatment of the RFC position provided for in the Commission's plan. The suggestion of the Bondholders Committee was:—

"In consideration of R.F.C.'s providing said new money by so purchasing said First Mortgage Bonds, Series A, R.F.C.'s existing claim against the Company, amounting as of January 1, 1939, to $3,862,870 ($2,963,000 principal and $899,870 interest) and represented by notes secured by General and Refunding Mortgage Bonds of the Company and other collateral, shall be provided for under the Plan in like securities and in like proportions as those given holders of the Company's existing First Mortgage Bonds;" (R. 806-807).

If no other consideration were involved, RFC, The Railroad Credit Corporation and A. C. James Co. would be entitled to treatment in proportion to the General and Refunding Bonds held by each as collateral. On that basis, RFC would receive, for its secured notes:—

$414,175 new income mortgage bonds
$649,518 new preferred stock
45,148 shares, new common stock

The Commission's plan, as has been noted, treats as a whole the claims of RFC on the secured notes and on the Trustees' certificates. If the allotment of new income bonds and stock to RFC under the plan were considered as being in exchange *only* for the Debtor's notes and the General and Refunding Bonds securing them, the effect of the Commission's plan would be to allot therefor:—

$1,185,200 new income mortgage bonds
$1,777,800 new preferred stock
15,788 shares, new common stock

The difference is $771,025 *more* income bonds, 11,282.82 *more* shares of preferred stock and 29,360 shares *less* of common stock. That difference has been referred to as the "RFC preference."

The record before the Commission was full and complete and it is submitted that on the basis of the facts with regard to the Debtor, its earnings, properties, and future prospects hereinbefore described, and of the proposals of various of the parties themselves, the Commission was well justified in concluding that the new first mortgage bonds were not on a parity with the Trustees' certificates now held by RFC and that the provision contained in the approved plan represented a reasonable adjustment of RFC's total rights. In addition to the detailed record before the Commission, testimony was introduced through two expert witnesses at the hearing in the District Court as to the factors to be taken into consideration in determining the market value of the proposed new securities. The testimony conclusively established that the new first mortgage bonds would have a market value substantially less than par and would probably sell for approximately 85 or 90 (R. 1530-1536). Assuming that the new first mortgage bonds would sell at 90, RFC would receive $1,000,000 less than that to which it is entitled for the Trustees' certificates, if the certificates were to be surrendered in consideration of the same principal amount of new first mortgage bonds alone. The value of $771,025 principal amount of new income bonds and of 11,282.82 shares of new preferred stock less the value of 29,360 shares of new common stock

would have to be $1,000,000 in order that RFC be fully compensated for the surrender of its rights as holder of the Trustees' certificates. The value may well be less and upon the argument we will ask the Court to take judicial notice of the prices at which similar securities of comparable railroad companies are actually selling on the market.

The treatment of the position of RFC is one of those "practical adjustments" which are part and parcel of the reorganization process. As this Court said in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 529 (1941):

> "Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case."

The practical nature of the adjustment is rather conclusively established by the fact that, as above pointed out, it is in accordance with the suggestion of the Debtor and the Institutional Bondholders Committee, consisting of owners of the Debtor's First Mortgage Bonds. The adjustment is still supported by the Institutional Bondholders Committee.

THE COMMISSION'S REPORTS MET ALL FORMAL REQUIREMENTS

The court below, in requiring some sixteen separate findings of dollars and cents values, sets up requirements of formalism with respect to the Commission's reports which are not warranted, we submit, by the statute or applicable decisions of this Court. On the

contrary, the statutory provisions and the applicable principles of law as determined by this Court require simply that valuations should be made in such instances and to such extent as the practical necessities of the particular case may require. Impracticable formality in the statement of the Commission's conclusions in this connection is not required.

Section 77 contains no requirement that findings shall be made by the Commission on all matters, but on the contrary provides broadly that in its report "the Commission shall state fully the reasons for its conclusions." This is in accordance with the general requirements for action by the Commission in other matters subject to its jurisdiction, as to which Section 14 of the Interstate Commerce Act now requires only, except in cases where damages are awarded, that the Commission shall file a written report stating "the conclusions of the Commission together with its decision." [28]

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[28] Prior to 1906 Section 14 required that the Commisison's report "shall include the findings of fact upon which the conclusions of the Commission are based," and was amended in that year to eliminate this requirement.

Even in damage cases impractical formality in the Commission's findings is not now required. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915); *Mills* v. *Lehigh Valley* R. R., 238 U. S. 473, 481 (1915). In the former case this Court stated "True, the findings in the original report are interwoven with other matters and are not expressed in terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings of fact from the other matter or in fully understanding them." (236 U. S. 428.)

Thus in *United States* v. *Louisiana*, 290 U. S. 70 (1933), a rate case, this Court stated that "there are no formal requirements for the findings to be made by the Commission in this type of case"; and while not commending the form of the particular report, the Court further held:

> "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (290 U. S. at 80)

This decision, and the long line of cases in accord [29] have been specifically followed in Section 77 reorganizations by the Circuit Court of Appeals for the Sixth Circuit in *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C.C.A. 6th, 1942), and in numerous District Court cases in which plans of reorganization based upon essentially the same character of report as that in the present case have been approved.[30]

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[29] *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74 (1930); *Florida* v. *United States*, 282 U. S. 194 (1931); *United States* v. *Baltimore and Ohio Railroad Co.*, 293 U. S. 454 (1935); *Pisceglia* v. *United States*, 24 F. Supp. 355 (D. C. S. D. N. Y., 1938); *Quanah, A. & P. Ry. Co.* v. *United States*, 28 F. Supp. 916 (D. C. Texas, 1939).

[30] See cases cited *supra*, pp. 34-36.

Although in *In re Chicago, Milwaukee, St. Paul and Pacific*

The contention of the Circuit Court of Appeals that findings of dollar valuation on all questions of allocations are for some reason necessary is clearly untenable. It is understood, of course, that the findings and conclusions of the Commission with respect to the interests and claims among which allocation of new securities is to be made, and with respect to the allocation itself, must be adequate for a fair and equitable allocation, and to enable the District Court, when the plan is certified to it to determine whether the statutory standard has been applied. It is submitted, however, that insistence upon universal dollar valuations in this connection is not only unnecessary but impracticable, and indeed that such valuation would in many circumstances tend to complicate rather than simplify the problems involved.[31]

We have demonstrated elsewhere in this brief that the finding of the Commission, approved by the District Court, that the equity and interests of the unsecured creditors and stockholders of the Debtor had

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Railroad Company, 124 F.(2d) 754 (C.C.A. 7th, 1941), the Circuit Court of Appeals for the Seventh Circuit appeared to agree with the Court below as to the necessity of further findings of value for the allocation of the new securities among the creditors (but not with respect to the exclusion of stockholders upon the basis of the finding that their interests were without value), the same Court in *In the Matter of Chicago and North Western Railway Company*, 126 F.(2d) 351, (C.C.A. 7th, 1942), recognized that its objection presented only "a procedural question," which it is submitted cannot stand in the light of the statutory provisions and decisions above referred to.

[31] See Bourne, *Findings of "Value" in Railroad Reorganizations*, 51 Yale L. J. 1057 (1942).

no value was unquestionably adequate to support their exclusion from participation in the reorganized company, and that an additional attempted finding of the exact dollar value of the Debtor's assets would have served no useful purpose. Similar situations may well exist as between senior and junior creditors. Conversely, where it is not controverted that a senior issue is fully satisfied, or that a junior issue has received all that remains after such satisfaction, is it not unnecessary to place a dollar valuation upon the property or securities received by the junior issue? And where the contributions of different mortgage divisions to the earning power of the total enterprise are clearly shown, may not the new securities, in the application of the determination of this Court in *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510 (1941), that "the criterion of earning capacity . . . is the essential one," be distributed essentially on the basis of such contributions without attempting the intermediate formality of a dollar valuation?

This is not to say that dollar valuations, where it is practicable to make them, may not be desirable or helpful under some circumstances. On the other hand, differences in the source and stability of the earnings capitalized, differences in the relative contribution of particular mortgage divisions to the total income of the enterprise at various earnings levels, controversies over the rate of capitalization to be applied and other circumstances may result in attempted dollar valuations, particularly of parts of a railroad system, in effect adding additional complications rather than constituting a help

toward the solution of the problem of allocating the securities of the reorganized company. The desirability and usefulness of an attempted dollar valuation is also affected by the type of the enterprise involved and the practicability of making such a valuation. This is particularly applicable to railroads, as to which this Court has expressly recognized that "* * * railroads, unlike farms and city lots and stocks and bonds, are not objects of exchange. The very notion of a 'full cash value' for a railroad is in many respects artificial. See 1 Bonbright, *The Valuation of Property*, pp. 511-632. Whatever may be the pretenses of exactitude in determining such a 'value', to claim for it 'scientific' validity, is to employ the term in its loosest sense." *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U. S. 362, 370 (1940).[32]

The decision of this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941), contains nothing to the contrary and indeed supports the conclusions just stated. The essential difficulty in the *Consolidated Rock Products* case was not the form of the opinion of the District Court approving the plan, but the absence of the essential evidence required to

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[32] "The ascertainment of the value of a railway system is not a matter of arithmetical calculations and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property." *Rowley* v. *Chicago & N. W. Ry. Co.*, 293 U. S. 102, 109 (1934).

sustain it. In the present case the Commission has rendered a detailed report and a supplemental report on further consideration in which, on the basis of the full and complete record made before it, it has "stated fully the reasons for its conclusions" on all matters here in question. Both in determining the aggregate capitalization of the reorganized company and in allocating new securities the Commission, recognizing the principle later definitely established by this Court in the *Consolidated Rock Products* case, gave dominant weight to the earning capacity of the system and of the property subject to its mortgages. In allocating on this fundamental basis the Commission, as has been demonstrated in our discussion of the fairness of the plan, made and applied all determinations of value necessary to assure a fair and equitable allocation without the necessity of making the formalistic dollars and cents valuations demanded by the Circuit Court of Appeals. The Commission has also specifically found in accordance with the statutory requirements (Section 77(d)) that the plan approved by it is fair and equitable and otherwise complies with the requirements of subsection (d) and (e) of Section 77, and will be compatible with the public interest. There is nothing in the statutory provisions or the requirements of due process which demands more.

III

THE CIRCUIT COURT OF APPEALS MISCONCEIVED THE RELATIVE FUNCTIONS OF THE COMMISSION AND THE DISTRICT COURT.

The Circuit Court of Appeals' view of the relative functions of the Commission and the District Court was stated to correct what the Circuit Court of Appeals considered "a possible misconception" on the part of the District Court regarding the expert character of the Commission in railroad matters. The District Court, in its opinion, had said:

> "It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned." (R. 1588; 34 F. Supp. at 501.)

This statement, said the Circuit Court of Appeals, "indicates a possible misconception" (R. 2672; 124 F. (2d) at 140), and after quoting the provisions of Section 77(e) the Circuit Court of Appeals stated its views as follows:

> "In determining whether a plan of reorganization satisfies the requirements of subsection e, the court is not concluded by any determination made by the Commission, but may, and

> must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court." (R. 2674; 124 F. (2d) at 140.)

In effect the position of the Circuit Court of Appeals is that the Commission on the record before it should make detailed dollar and cents valuations of properties, claims, new securities, etc., and that upon receiving the record certified to it by the Commission the District Court should independently and *de novo*, disregarding even the expert character of the Commission, again make detailed dollar and cents valuations of the same properties, claims, new securities, etc. If the determinations thus made by the Court should happen to agree with those made by the Commission, then and only in that event would the Court be in a position to approve the plan.

Obviously this view of the relationship between the Commission and the District Court is utterly inconsistent with the repeated decisions of this Court, which have recognized that the determinations of the Interstate Commerce Commission are entitled to "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U.S. 441, 454 (1906). Indeed, it hardly seems necessary to cite to the Court at this date

the long line of cases [33] in which as summarized in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139 (1939) this Court has held that "even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrowed. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestible." And in the very recent case of *Gray* v. *Powell*, 314 U.S. 402, 412 (1941), this Court has warned that "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." The view of the court below as to the functions of the Commission in railroad reorganizations would not only reduce that agency to a "mere fact-finding body," but would permit the courts then to disregard the facts which the Commission had found.

[33] E. g., *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441 (1906); *Interstate Commerce Commission* v. *Illinois Central R. R. Co.* 215 U. S. 452, 471 (1910); *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541 (1912); *Manufacturers Ry. Company* v. *United States*, 246 U. S. 457 (1918); *United States* v. *Illinois Central Railroad*, 263 U. S. 515 (1924); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271 (1926); *Virginian Railway Company* v. *United States*, 272 U. S. 658, 665 (1926); *Assigned Car Cases*, 274 U. S. 564 (1927); *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 29 (1932); *Atlanta, Birmingham and Coast R. R. Co.* v. *United States*, 296 U. S. 33 (1935); *Rochester Telephone Corp* v. *United States*, 307 U. S. 125 (1939).

That the view of the Circuit Court of Appeals was erroneous is established by the provisions of Section 77 itself, and its historical background. Section 77, under which railroad reorganizations were brought for the first time within the provisions of the Bankruptcy Act, was enacted in order to remedy a long series of abuses in prior equity receivership proceedings relating to railroads, which had resulted in unsound capital structures, excessive allowances of fees and lack of consideration of the public interest. While under Section 20a of the Interstate Commerce Act (49 U.S.C., Sec. 20a(2)), the Commission had jurisdiction over the issuance of securities by railroads, it had no direct power over the plan of reorganization itself, and was frequently placed in a very embarrassing position by the practice of reorganizers not to make application under Section 20a until substantially all other steps in the reorganization had been completed and the plan was on the verge of final consummation.[34] This situation was brought particularly to public attention during the 1925-1928 reorganization of the Chicago, Milwaukee and St. Paul Railway Company.[35]

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[34] See *Denver & Rio Grande Western Reorganization*, 90 I.C.C. 141, 158 (1924); *Chicago, Milwaukee and St. Paul Reorganization*, 131 I.C.C. 615, 671 (1928).

[35] *United States* v. *Chicago, Milwaukee and St. Paul Railway Company*, 282 U. S. 311 (1931). Section 77 was avowedly intended to write into law the dissenting opinion in that case. See the remarks of Representative La Guardia, the manager of bill, upon the floor of the House in 76 Cong. Rec. 2924.

In enacting Section 77 Congress sought to remedy these evils by the introduction in the public interest of an administrative agency into railroad organizations and the strengthening of the power of that agency to deal with the abuses which had previously existed. The Interstate Commerce Commission was utilized as the appropriate administrative tribunal because of its specialized knowledge of railroad problems and its long experience in the field. Indeed, when Section 77 was under consideration there was a considerable body of opinion in favor of entirely withdrawing control of railroad reorganizations from the Courts and lodging such control with the Interstate Commerce Commission. This was recognized by this Court in *Palmer* v. *Massachusetts*, 308 U.S. 79, 86-87 (1939), in which the Court stated:

> "Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act. But the long history of Federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent rail-

roads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of §77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

"The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission." [36]

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[36] Accordingly, as summarized by this Court in the footnote to the statement quoted in the text: "Section 77(c)(1) requires the appointment of trustees to be ratified by the Commission; §77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; §77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval; §77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; §77(c)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; §77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; §77(c)(12) gives the Commission a supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; §77(d) and 77(e) give to the Commission control over any proposed plan of reorganization; §77(p) gives to the Commission control over the solicitation of proxies or deposit agreements."

To the same effect is *Warren* v. *Palmer*, 310 U. S. 132, 138 (1940) where this Court stated that "the judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."

With regards to plans of reorganization, the debtor's plan is required to be filed simultaneously with the Court and the Commission. Other plans may be filed by specified percentages of creditors and stockholders, or by any party in interest with the consent of the Commission. If a plan filed with the Commission is considered by it to be prima facie impracticable, it receives no further consideration. Except in this event, public hearings on the proposed plan of reorganization are held before the Commission at which opportunity is given to any interested party to be heard and following which the Commission renders a report and order approving a plan (which may be different from any proposed in the proceedings) which will in its opinion meet the requirements of sub-sections (b) and (e) of Section 77 and will be compatible with the public interest.

Sub-section (b) describes broadly what the plan of reorganization may contain. In finding that the plan meets the requirements of sub-section (e) the Commission is required to find that it "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of

the law of the land regarding the participation of the various classes of creditors and stockholders." [37] Subsection (e) also provides that if it shall be necessary to determine the value of any property for any purpose under Section 77, such value shall be determined by the Commission in the manner there provided. Under the same sub-section the Commission is authorized to find that the interests of any class of creditors or stockholders are not adversely and materially affected by the plan, or (as alternatives to a specific finding of insolvency) that the equity or interests of such class of creditors or stockholders has no value, or that the plan provides for the payment to such creditors or stockholders of an amount not less than the value of their equity or interests. If any such finding be affirmed by the court, as hereinafter described, submission of the plan to such class of creditors or stockholders for acceptance or rejection is not to be required. In addition to the foregoing findings under sub-sections (b) and (e) the Commission, as has been pointed out, is required to find that the plan approved by it "will be compatible with the public interest."

When the plan so approved by the Commission is certified to the court objections and claims for equitable treatment may be filed by all parties in interest and a hearing, as was done in the present case, is to be held

[37] In addition, subsection (e) contains certain requirements as to expenses and costs of administration of the proceedings, and regarding the provisions made in the plan for claims of the United States.

thereon. Following such hearing the court is to approve the plan, if satisfied that it meets the requirements next to be described. If the court for any reason should disapprove the plan, it is not authorized to make changes or modifications therein, but has as its only alternatives the reference of the proceedings back to the Commission or the dismissal thereof.

In approving the plan certified to it by the Commission the Court is required to find that it complies with the provisions of sub-section (b) above referred to and "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."[38] No provision is made, it will be noted, for a finding by the court that the plan "will be compatible with the public interest"; nor is the court, as distinguished from the Commission, specifically authorized to pass upon the valuation of the property of the Debtor for reorganization purposes. In the event of findings by the Commission that a particular class of creditors or stockholders is not materially adversely affected by the plan, or that the equity or interests of such creditors or stockholders is without value, the statute provides that if such determination is "affirmed" by the court

[38] The findings with reference to the expenses and allowances involved in the proceeding, and with respect to provision for the claims of the United States, are applicable to the court as well as to the Commision.

submission of the plan to such creditors or stockholders will not be required.

In two decided cases the Commission's determinations of capitalization and value under Section 77 have been held conclusive where not arbitrary or exceeding constitutional limitations. *Akron, Canton & Youngstown Railway Company* v. *Hagenbuch*, 128 F. (2d) 932 (C.C.A. 6th, 1942); *In re Erie Railroad Company*, 37 F. Supp. 237, 243-245 (D.C.N.D. Ohio, 1940). In the *Akron, Canton & Youngstown* case the Circuit Court of Appeals for the Sixth Circuit stated:

> "The duties imposed on the courts and the powers conferred on the Interstate Commerce Commission under this Section of the Act, when construed in relation to other Sections, are separate and distinct. As to some matters under the Act, such as the determination of value, a broad discretion is lodged in the Interstate Commerce Commission and the court does not sit as a board of revision to substitute its judgment for that of the Commission. In such matters, the judicial inquiry into the facts goes no further than to ascertain whether there is substantial evidence to support the findings of the Commission and the question of the weight of the evidence in determining such matters lies with the Commission when acting within its statutory authority. *Palmer* v. *Massachusetts*, 308 U. S. 7, 87, 60 S. Ct. 34, 84 L.Ed. 93. Section 77, sub. d., 11 U. S. C. A. §205, sub. d., provides that the Commission 'shall approve a plan . . . that will in its opinion meet with the requirements of subsections (b) and (e) of

this section, and will be compatible with the public interest.' Similar terms are found in paragraph (2) of Section 20(a) and paragraph (3) of Section 5 of the Interstate Commerce Act, 49 U. S. C. A., §§(5) (3), 20a(2), which were in effect before the passage of the Act in question. The validity of the Act conferring such power on the Commission was approved in New York Central Securities Corporation v. United States, 287 U. S. 12, 24, 53 S. Ct. 45, 77 L. Ed. 138. Historically, the power to value railroad properties for rate making and capitalization purposes has always been lodged in the Interstate Commerce Commission.

"There is nothing in the present Act which would indicate that the Congress intended to deprive the Commission of any of the powers it had so long exercised in valuing railroad properties for capitalization purposes.

"The determination of the value of the properties, and the amount and character of capitalization, are legislative functions affecting the public interest and are exclusively within the province of the Commission under the Act. The only qualification is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly within the bounds of the Constitution and not arbitrarily." (128 F. (2d) at 940.)

This appears also to have been the view of the District Court in the present case (R. 1596-1597; 34 F. Supp. at 501, 504), although the District Court in addition made expressly clear (R. 1597; 34 F. Supp. at 504-505) that it was itself wholly in accord with the

conclusions reached by the Commission upon all issues. Whether applied to all matters passed upon by the Commission or considered as particularly applicable to determinations of capitalization and value and other matters directly affecting the public interest, it is also directly in line with the numerous decisions of this Court above referred to in which findings of the Interstate Commerce Commission upon a controversy within its jurisdiction, supported by substantial evidence, have been held to constitute a determination by an administrative tribunal not open to review. Naturally, as all of the cases recognize and the opinion of the District Court in the present proceedings expressly points out, this interpretation of the relative functions of the Court and the Commission is subject to the qualification that the Court "shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily." (R. 1596; 34 F. Supp. at 504). The District Court found, and we have demonstrated elsewhere in the present brief, that these requirements were fully complied with.

In numerous other cases under Section 77 the lower courts, without directly passing upon the exact weight to be given the Commission's findings, have repeatedly emphasized that, directly contrary to the views of the Circuit Court of Appeals in the present case, the Commission's determinations are entitled to great weight as those of an expert administrative body

"appointed by law and informed by experience."[39] *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 F. (2d) 754 (C.C.A. 7th, 1941); *In re Chicago and North Western Railway Company*, 35 F. Supp. 230 (N.D. Ill., 1940), affirmed 126 F(2d) 351 (C.C.A. 7th, 1942); *In re Denver and Rio Grande Western Railroad Company*, 38 F. Supp. 120 (D.C., Colo., 1941); *In re Missouri Pacific Railroad Company*, 39 F. Supp. 436 (D.C.E.D., Mo., 1941); *In re St. Louis-San Francisco Railway Company*, not yet reported (D.C.E.D., Mo., July 25, 1942).

Thus in the *Milwaukee* case the Circuit Court of Appeals stated:

> "* * * While question-arousing arguments have been advanced for and against the plan, which invite lengthy discussion by us, the outstanding, unchallenged fact is that the conclusions of the I. C. C., approved by the District Court, are entitled to great weight, and we are hardly justified in substituting our judgment for that of those tribunals, save where clearly satisfied that their judgment is erroneous, or is based upon incorrect assumptions, or where an incorrect rule or principle is applied."[40] (124 F. (2d) at 762.)

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[39] *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S. 441, 454 (1906).

[40] The District Court in the Milwaukee case, whose decision was reversed on other grounds by the Circuit Court of Appeals, stated in this connection:

> "It is apparent that it was intended by the law that the bankruptcy court and the Interstate Commerce Com-

The Interstate Commerce Commission has through long experience acquired a highly specialized knowledge of railroad problems, and has for many years been charged with the protection of the public interest in this field. Obviously the Commission, through the training and experience of its members and its specialized knowledge and facilities, is peculiarly qualified for the consideration of questions of the character here involved, and was specially charged with their consideration by Congress under the provisions of Section 77. These qualifications of the Commission, as has been seen, were directly recognized by the District Court in the present case (R. 1588; 34 F. Supp. at 501), and it is submitted that far from indicating, as

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mission should cooperate to the end that a fair and equitable plan of reorganization might be provided. Such purpose has been declared in a recent decision of the Supreme Court of the United States in Warren v. Palmer, 310 U.S. 132, 60 S. Ct. 865, 85 L. Ed. 1118.

"That Court has not yet determined just what weight should be given by the court to the findings and conclusions of the Commission. Clearly, the court has power to correct errors of law into which the Commission may have fallen and to set aside findings of fact which are not supported by the record or conclusions which violate constitutional rights. On the other hand, the initial determinations of the questions bearing on the soundness and reasonableness of a plan of reorganization is the responsibility of the Commission which is peculiarly fitted for the consideration of such questions and its findings and conclusions, made and reached after extended hearings and exhaustive study, as in this case, should be given great weight." *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 36 F. Supp. 193, (D.C.N.D. Ill., 1940).

the Circuit Court of Appeals stated, " a possible misconception" (R. 2672; 124 F.(2d) at 140), such recognition constituted the least possible weight which could be given to the Commission's determinations.

The Circuit Court of Appeals' strictures may possibly have resulted from an unexpressed acceptance of an argument made by the objectors to the plan that because Section 77(e) requires the judge to be "satisfied" that the plan is fair and equitable, they were entitled to an independent, *de novo* judgment by the District Court on all points, disregarding the Commission's determinations. The record suggests, indeed, that the objectors would be satisfied that the "independent judgment" of the District Court had been exercised only if it disagreed on all points with the Commission, and agreed entirely with their own contentions. In any event, it is submitted that the statutory language will not bear the construction sought to be placed upon it. Having in mind the well established doctrine of this Court as to the administrative finality of the Commission's decisions, the expertness of the Commission in the field and the practical reality that no two persons acting fully independently would ever arrive at an identical plan,[41] the

[41] There is no requirement under Section 77 that the Court should find that a plan of reorganization approved by the Commission is *the* plan which the Court would have written. Nor is it necessary for the Court to find that it is the best plan. As was said by the District Court in approving the Commission's plan for the reorganization of the Chicago and North Western:

"It has been observed that the Interstate Commerce

Congress presumably contemplated that the District Court in becoming "satisfied" that the plan was fair and equitable should proceed upon the basis of the factual determinations and the conclusions of the Commission, where these were supported by substantial evidence, do not involve errors of law and are within constitutional limits.[42] Certainly the recognition by the District Court of the expert administrative character of the Commission, and the according of great weight to its conclusions, are in no way inconsistent with the District Court itself being fully and completely "satisfied" with the fairness and equity of the plan. That a builder should be satisfied with the architect's plan before undertaking construction in accordance therewith does not mean that the builder must make, or

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Commission is not required to formulate the best possible plan of reorganization and that the Court is not limited to the approving of the best possible plan of reorganization." *In re Chicago and North Western Railway Company*, 35 F. Supp. 230, 256 (D.C.N.D. Ill., 1940).

[42] One court, referring to the observation of this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 113-114 (1939) that the question whether on predetermined facts a plan was fair and equitable was a question of law, has suggested that this required the Court to exercise its independent judgment on questions of fact, specifically, the soundness of the estimated revenues in a normal year as determined by the Commission. *In re Chicago and North Western Railway Company*, 126 F. (2d) 351, 364 (C.C.A. 7th, 1942). Obviously, no such implication is justified. In addition, Section 77B reorganizations involved no such determinations by an expert administrative body as are provided for in railroad reorganizations under Section 77.

would consider himself competent to make, all the detailed calculations made by the architect in arriving at the plans and specifications. And when Congress, as in the Railroad Adjustment Act of 1939,[43] desired to provide that the Court should consider certain plans of reorganization independently of the findings of the Commission, it made express provision to that effect.

In a few cases in the lower courts some emphasis has been laid upon the exercise of an independent judgment by the District Court, but even these decisions, with the exception of that of the Circuit Court of Appeals in the present case, have repeatedly emphasized the great weight to be accorded the conclusions of the Commission. *In re Chicago and North Western Railway Company*, 121 F.(2d) 791 (C.C.A. 7th, 1941); *In re Chicago and North Western Railway Company*, 126 F.(2d) 351 (C.C.A. 7th, 1942); *In the Matter of New York, New Haven and Hartford Railroad Company*, not yet reported (D.C. Conn., December 8, 1941). Thus in the Chicago and North Western decision first cited the Circuit Court of Appeals for the Seventh Circuit, although referring to "jurisdiction" as in the Court and "judicial action" as

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[43] 53 Stat. 1134-1151; 11 U.S.C. Secs. 1200-1255. In the Railroad Adjustment Act Congress provided that in passing upon the fairness and equity of the plan "the Court shall scrutinize the facts independently * * * of the fact that the Commission under Section 20a of Title 49, has authorized the issuance or modification of securities as proposed by such plan, and of the fact that the Commission has made such or similar findings." 11 U.S.C. Section 1225(3).

required, also described matters "such as relate to financial set-up, meeting of obligations, determinations of value, etc." as particularly entrusted to the I.C.C., and stated:

> "In the field wherein it exercises the powers expressly given it, the findings of the I.C.C. are well nigh conclusive. True, it may not be said that the orders of the I.C.C. are unassailable if wholly lacking in evidentiary support. But where, in matters relating to plans of reorganization, earning power of the debtor, its operations, having in view the greatest service to the public and the greatest net earnings for its security holders, the findings of the I.C.C. should be, as they are, accepted almost as verities by the Court." (121 F.(2d) at 796.)

Several cases in the lower courts have also recognized that the question of the precise weight which should be accorded to the determinations of the Commission arises only where disagreement with such findings might otherwise exist. *In re Chicago Great Western Railroad Company*, 29 F. Supp. 149, 160 (D.C.N.D. Ill., 1939); *In re Chicago and North Western Railway Company*, 35 F. Supp. 230, 237, 253 (D.C.N.D. Ill., 1940), affirmed 126 F. (2d) 351 (C.C.A. 7th, 1942). In its opinion approving the plan of reorganization in the present case the District Court made clear that it was not in disagreement but wholly in accord with the findings of the Commission. After discussion of the two issues of the amount and character of capitalization and the dis-

tribution of the new securities provided for under the plan, the District Court emphatically stated that:

> "I have read the record and carefully considered all of the objections offered by the respective objectors to the Commission plan. I have also read the briefs of respective counsel in support of the objections. *I am wholly in accord with the conclusions reached by the Commission upon both issues and all matters incidental thereto.* It seems to me that further discussion would be superfluous. * * * *
>
> *"Upon a consideration of the entire record I am of the opinion* that the Commission plan complies with the provisions of subsection b of Section 77 and is supported by the evidence; that it is fair and equitable; that it affords due recognition to the rights of each class of creditors and stockholders; that it does not discriminate unfairly against any class of creditors or stockholders; that it will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and that it provides for payment of all costs of administration and other allowances made or to be made by this court." (R. 1597, 1599-1600; 34 F. Supp. at 504-505; italics supplied.)

Accordingly, since the District Court was entirely in agreement with the determinations made by the Commission, it properly approved its findings regardless of the technical weight to be given to them.

Under these circumstances definite determination by this Court of the relative functions of the Commission

and the District Court in railroad reorganizations under Section 77 is not absolutely essential in the present case. Nevertheless, in view of the conflicting theories which have been argued at length in these proceedings, and of the number of railroads in reorganization under Section 77, we urge the Court to pass upon this matter, and to give to the provisions of Section 77 a construction which will make the statute a workable one.

As a practical matter, there are only two avenues of approach in the doing of any job in which two people or two bodies have responsibility, but in which neither has authority to change what the other has done. Either each must do parts of the job independently of the other with questionable results in fitting together their finished products or one must take the initiative and do the job, leaving it to the other to check the results against required standards and on the basis of that check to approve or disapprove it. Under Section 77 Congress has delegated the taking of the initiative—the "doing of the job"—to the Commission, and it is submitted that "having found that the record permitted the Commission to draw the conclusion that it did a court travels beyond its province to express concurrence therein as an original question." *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145-146 (1939). Certainly, the findings and conclusions of the Commission, in the performance of the task delegated to it by Congress, are entitled to great weight as the determinations of the expert administrative body long charged with the protection of the public

interest in the railroad field. Only thus can the intent of Congress be made effective, and Section 77 rendered a workable statute for the consummation of railroad reorganizations.

IV

UPON THE ENTIRE RECORD THIS COURT SHOULD REVERSE THE DECREE OF THE CIRCUIT COURT OF APPEALS AND AFFIRM THE ORDER OF THE DISTRICT COURT APPROVING THE PLAN

Instituted in 1935, these reorganization proceedings have now been pending for more than seven years. In accordance with the provisions of Section 77 the Interstate Commerce Commission, the administrative body experienced in the field, has held lengthy hearings in which the full record hereinbefore described was developed, including all requisite valuation data and all other information necessary for the reorganization of the Debtor.

Upon the basis of this complete record and after hearing all of the parties the Commission developed a plan of reorganzation for the Debtor which, as modified after again hearing all of the parties on petitions for modification, became the plan of reorganization approved by the Commission and certified to the District Court, and now under consideration here. This plan the Commission found to be compatible with the public interest, fair and equitable, and in all respects in accordance with the provisions of Section 77. In the District Court further evidence was taken and all parties again heard both on brief and in oral argument, and the District Court thereafter likewise ap-

proved the plan and declared its provisions to be fair and equitable and in all respects in accordance with law.

The Circuit Court of Appeals, as has been pointed out, failed to pass definitely upon the controversies involved, and on the basis of a misinterpretation of the decision of this Court in the *Consolidated Rock Products* case demanded that numerous formalistic dollars and cents valuations should be made by the Commission, and independently made again by the District Court, before it would pass thereon.

That the Commission in its reports and orders stated fully its conclusions and the reasons therefor in accordance with the statutory requirement, and made all necessary findings and conclusions, has been hereinbefore fully established. Under these circumstances, and in view of the full and complete record, we urge this Court in the public interest and in the interest of the conclusion of these long drawn out proceedings not to remand the case to the Circuit Court of Appeals for further action but to dispose finally and conclusively of the problems involved."

As hereinbefore pointed out, the same general principles and procedure followed by the Commission in this case have been followed by it in numerous other reorganizations under Section 77 now pending either before the Commission or the courts. The aggre-

" The jurisdiction of this Court to make such final disposition notwithstanding the failure of the Circuit Court of Appeals to pass upon the merits, is unquestionable. *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, 567-568 (1931); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920).

gate principal amount of the outstanding loans of Reconstruction Finance Corporation itself to railroads or their trustees in cases where the plans of reorganization may be affected by the decision in the present case exceeds $125,000,000. In order that the parties in these various proceedings, as well as the Commission and the courts, may be advised of the proper principles and procedure to be followed in reorganizations under Section 77, it is respectfully requested that the Court in its decision in the present case clear away the misconceptions which, it is believed, have arisen about the decision in the *Consolidated Rock Products* case, and indicate practicable principles and procedure to be followed in railroad reorganizations on the matters herein involved.

CONCLUSION

It is submitted that the decree of the Circuit Court of Appeals should be reversed, and that the order of the District Court should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1942

APPENDIX A

The provisions of Section 77 of the Bankruptcy Act (11 U. S. C., Section 205) pertinent in this case are the following:

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the *Interstate Commerce Commission* (hereinafter called the *"Commission"*).

* * * * *

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the re-

organized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or

in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are exccutory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

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(c) After approving the petition:

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(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the *Commission*, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the *Commission* for its recommendations after hearings thereon if the parties shall so request and/or the *Commission* determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The *Commission* may direct such of its agencies as it may designate to file in the proceedings before the *Commission* a report, and additional or sup-

plemental reports at such time or times as the *Commission* shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the *Commission*, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the *Commission* and shall be borne by the debtor's estate.

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(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plans shall also be filed with the *Commission* at the same time. Such plans may likewise be filed at any time before, or with the consent of the *Commission* during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than

10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the *Commission* by any party in interest. After the filing of such a plan, the *Commission*, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the *Commission* shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the *Commission* shall state fully the reasons for its conclusions.

The *Commission* may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The *Commission*, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved

or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the *Commission* and certified to the court.

* * * * *

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the *Commission*, hear all parties in interest is support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets,

for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable; are within such maximum limits as are fixed by the *Commission*, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the *Commission* for further action, in which event he shall transmit to the *Commission* a copy of any evidence received. If the proceedings are referred back to the *Commission*, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the *Commission*. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and

allowed in accordance with the requirement of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the *Commission* shall specify, together with the report or reports of the *Commission* thereon or such a summarization thereof as the *Commission* may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the *Commission* shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the *Commission* shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of

their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the *Commission* and shall be borne by the debtor's estate. The *Commission* shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholder of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured

by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order

and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the *Commission* for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the *Commission*, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the *Commission* shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, sub-

ject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the

debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the *Commission* shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.

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(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the *Commission*, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

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(q) The provisions of section 12 of Title 49 shall be applicable to enable the *Commission* to perform its duties under this section and the provisions of such

section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

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March 3, 1933, c. 204, §1, 47 Stat. 1474; August 27, 1935, c. 774, 49 Stat. 911; June 26, 1936, c. 833, 49 Stat. 1969; August 11, 1939, c. 689, 53 Stat. 1406. [Italicization of the word "Commission" added.]